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The Development of AIDS Federal Civil Rights Law: Anti-Discrimination Law Protection of Persons Infected with Human Immunodeficiency Virus

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THE DEVELOPMENT OF AIDS FEDERAL CIVIL RIGHTS LAW: ANTI-DISCRIMINATION LAW PROTECTION OF PERSONS INFECTED WITH HUMAN IMMUNODEFICIENCY VIRUS

DONALD H. J. HERMANN*

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INTRODUCTION

Almost as quickly as Acquired Immune Deficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV) infection came to be recognized as a significant medical problem, legal and political authorities recognized that the health care crisis raised significant problems that needed to be addressed by both the public health law and civil liberties law. The public health law concerns were readily apparent in the form of a need for statutory authority to achieve epidemiological objectives, to halt transmission through education and voluntary compliance, and to employ coercive measures where necessary. At the same time, given the potential for discrimination for a medical condition that disproportionately affected minority communities including homosexuals, racial minorities, and intravenous drug users required protective measures aimed at confidentiality and informed consent for HIV-antibody testing. While the individual states developed special legislation that attempted to reconcile public health and civil liberty concerns, the need for national civil rights legislation protecting those affected by HIV-infection and AIDS became increasingly apparent. Initial protection from discrimination was provided to individuals with AIDS and HIV infection by inclusion within the category of persons protected by the Rehabilitation Act of 1973. However, protection was largely limited to prohibitions of discrimination in federal employment and to those employed in organizations receiving federal funding. Some consideration was given to enacting legislation specifically protecting those with HIV-infection or AIDS from unjustified discrimination; however, the political obstacles to enacting specific AIDS-related civil rights legislation appeared formidable. Therefore, the decision was made to develop broad general legislation protecting the disabled from inappropriate discrimination and within this general anti-discrimination legislation to provide protection to persons with AIDS or HIV. This approach to a general anti-discrimination statute resulted in the Americans with Disability Act (ADA). While other legislation such as the Fair Housing Act and the education of the Handicapped Act were interpreted to provide protection for certain specific groups of persons with AIDS and HIV-infection, the general population affected by these conditions have found federal protection from discrimination under the terms of the Rehabilitation Act of 1973 and the Americans with Disabilities Act.

Rather than specifically identify particular disease conditions which gave rise

to anti-discrimination protection, the American with Disabilities Act took the form of general legislation and adopted the broad textual language including the use of such terms as "disability" and "physical or mental impairments" and "substantially limits one or more major life activities."¹ Such broad textual language has resulted in the development of a significant history of administrative agency legal analyses and judicial opinions addressing whether the medical condition and the resulting effects of AIDS and HIV infection qualify the infected individual for protection under the ADA. Issues of legislative history, implementing agency authority, and judicial approaches to statutory interpretation along with medical and scientific evidence have provided the rich texture for a complex history of the undertaking to provide national civil rights protection to persons with AIDS and HIV-infection, whether symptomatic or asymptomatic. Although the United States Supreme Court only recently has undertaken an effort to determine the extent of the protection provided to persons with AIDS and HIV infection, the Court's opinion did not definitely answer the question of whether all persons with AIDS or HIV infection qualify for protection under the American with Disabilities Act. Broad issues remain as to whether Congress achieved its intent to adopt effective national civil rights legislation protecting all persons with AIDS or HIV infection when it enacted the Americans with Disabilities Act in 1990.

I. INFECTION WITH HUMAN IMMUNODEFICIENCY VIRUS

The reported history of HIV and the resulting condition of AIDS began in 1981 with articles in medical journals describing outbreaks of pneumonitis carina pneumonia and kaposi's sarcoma in homosexual men with apparently malfunctioning immune systems.² By 1983, what we now know as HIV was isolated and determined to be the causal agent in producing AIDS.³

HIV infection results in selective depletion of the human body's T-lymphocytes or CD4+ cells, the helper white blood cells, that are a primary part of the human's immune system.⁴ The destruction of the CD4+ cells and the resulting decline in the functioning of the immune system makes the body susceptible to secondary infection.

1. Americans with Disabilities Act, 42 U.S.C. §§ 12,101-12,213 (1994 & Supp. III 1997).

2. See Michael S. Gottlieb et al., *Pneumocystis Carinii Pneumonia and Mucosal Candidiasis in Previously Healthy Homosexual Men: Evidence of a New Acquired Cellular Immunodeficiency*, 305 NEW ENG. J. MED. 1425 (1981); Kenneth B. Hymes et al., *Kaposi's Sarcoma in Homosexual Men—A Report of Eight Cases*, LANCET, Sept. 19, 1981, at 598.

3. See Francoise Barre-Sinoussi et al., *Isolation of a T-Lymphotropic Retrovirus from a Patient at Risk for Acquired Immune Deficiency Syndrome (AIDS)*, 220 SCI. 868 (1983); John Coffin et al., *Human Immunodeficiency Viruses*, 232 SCI. 697 (1986); Robert C. Gallo et al., *Frequent Detection and Isolation of Cytopathic Retrovirus (HTLV-III) from Patients with AIDS and at Risk for AIDS*, 224 SCI. 500 (1984).

4. See Jay A. Levy, *Human Immunodeficiency Viruses and the Pathogenesis of AIDS*, 261 JAMA 2997 (1989).

During the early history of the AIDS epidemic the course of the disease complex was conceptualized as involving acute or primary infection, initial infection followed by a latent period after which activation of viral reproduction resulted first in AIDS-related complex (ARC) leading to systemic AIDS.⁵ The initial infection is often accompanied by fevers, skin eruptions, myalgias, arthralgias, malaise, swollen glands, sore throats, gastrointestinal symptoms, and headaches.⁶ These physical symptoms will often subside for a significant period of time. However, when subsequent viral replication becomes significant, the patient often experiences persistent generalized lymphadenopathy (swollen glands) as well as fatigue, skin rash, fever, diarrhea, muscle pain, night sweats, and weight loss.⁷ Patients with these symptoms formerly were diagnosed as having ARC.⁸ A person can be diagnosed as having AIDS when the person's CD4+ count declines below 200 cells/MM3 of blood or when CD4+ cells comprise less than fourteen percent of the normal total of lymphocytes.⁹ With AIDS, the various physical symptoms described above continue, the CD4+ cell count further declines, and the patient experiences various opportunistic infections and diseases such as pneumocystis, carinii pneumonia, kaposi's sarcoma, and non-Hodgkin lymphoma.¹⁰

Increasingly HIV/AIDS is understood as a continuing spectrum of infection following an established progression which may be delayed by available medication.¹¹ The initial progression of infection may not be accompanied by observable physical symptoms and, thus, is often denominated as the "asymptomatic" phase. What was earlier thought of as a latency period of time when the virus was inactive, is now understood to involve a migration of the virus from the circulatory system into the lymph nodes with a disappearance of overt physical symptoms, but with measurable viral replication.¹² However, even during this so-called asymptomatic stage, many persons continue to manifest bacterial infections, skin disorders, and lymphadenopathy.¹³

By mid-1997, the CDC reported that 612,078 individuals had been diagnosed

5. See William A. Haseltine, *Silent HIV Infections*, 320 *NEW ENG. J. MED.* 1487 (1989).

6. See Robert R. Redfield & Donald S. Burke, *HIV Infection: The Clinical Picture*, 259 *SCI. AM.* 90 (1988).

7. See Yarchoan & Pluda, *Clinical Aspects of Infection with AIDS Retro Virus*, in *AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION* 112 (DeVita et al. eds., 2d ed. 1988).

8. See Koenig & Fauci, *AIDS Immunopathogenesis and Immune Responses*, in *AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION*, *supra* note 7, at 61-71.

9. See U.S. Dep't of Health and Human Services, *1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults*, 41 *MORBIDITY & MORTALITY WEEKLY REP.* No. RR-17, Dec. 18, 1992.

10. See *THE AIDS KNOWLEDGE BASE* 4.1-9 (P.T. Cohen et al eds., 2d ed. 1994).

11. See Michael S. Saag, *Clinical Spectrum of Human Immunodeficiency Virus Diseases*, in *AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION* 205-06 (DeVita et al. eds., 4th ed. 1997).

12. See *THE AIDS KNOWLEDGE BASE*, *supra* note 10, at 4.1-4, 4.1-8.

13. See *id.* at 4.1-9.

with AIDS in the United States.¹⁴ In 1996, the CDC estimated that there were 239,000 persons living with an AIDS diagnosis.¹⁵ The CDC estimated that there are more than one million HIV-positive people living in the United States, this means that there were more than 750,000 HIV-infected persons who may have been asymptomatic.¹⁶

II. HIV-RELATED DISCRIMINATION AND DISABILITY LAW

Discrimination against HIV-infected persons has its origins in a complex of fears, phobias, and prejudices. Fear of contagion is the most often expressed concern by those accused of discrimination. Nevertheless, the fact that persons with HIV-infection may be disproportionately discriminated against as compared to members of otherwise discriminated against groups, such as gay men or people of color, is often cited as a basis for the need of legal protection against discrimination.

The development of legislation to combat discrimination against HIV-infected persons has an equally multi-faceted objective. Such laws have the purpose of ending discrimination against persons with a significant disability and bringing such persons within the economic and social mainstream of American life.¹⁷

Another significant concern about discrimination against HIV-infected persons arose out of the public health strategies developed to trace and stop the spread of HIV. Educational efforts to change behavior to prevent the transfer of the virus from one person to another and blood testing programs, aimed at informing individuals of their infected status, required the voluntary involvement of potentially infected persons who would be discouraged from such voluntary testing if they feared possible discrimination based on their infected status by those who might learn of it. This concern was reflected in the 1988 Report of the Presidential Commission on the Human Immunodeficiency Virus Epidemic that reported:

HIV-related discrimination is impairing this nation's ability to limit the spread of the epidemic. Crucial to this effort are epidemiological studies to track the epidemic as well as the education, testing, and counseling of those who have been exposed to the virus. Public health officials will not be able to gain the confidence and cooperation of infected individuals or those at high risk for infection if such individuals fear that they will be unable to retain their jobs and their housing, and that they will be unable to obtain the medical and support services they need because of discrimination based on a positive HIV antibody test.¹⁸

14. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HIV/AIDS, June 1997, at 3.

15. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HIV/AIDS, Dec. 1996.

16. See U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HIV/AIDS, Feb. 1993, at 15.

17. See S. REP. NO. 116, at 2 (1989).

18. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 19 (1988).

Both houses of Congress relatively quickly endorsed the conclusion of the Presidential Commission that:

As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the HIV epidemic and will leave HIV-infected individuals isolated and alone.¹⁹

By the time of the issuance of the Report of the President's Commission on the Human Immunodeficiency Virus, the reality of discrimination against persons with AIDS and HIV infection was manifest. Children were excluded from schools because of their AIDS diagnosis,²⁰ tenants were discriminated against in housing because of their HIV infection,²¹ patients were denied medical treatment because of their sero-positive status,²² and individuals were denied employment or fired because they were determined to be at risk or to have AIDS.²³ Advocates and public interest groups sought to protect persons with AIDS as a basis in existing law or suggested the passage of new legislation. Some states passed legislation to protect the rights of individuals from compelled testing and to provide protection of the confidentiality of HIV testing records or AIDS diagnostic records.²⁴ At the federal level, civil rights laws provided one alternative. Neither homosexuals nor intravenous drug users, two groups that experienced a high rate of HIV infection, were protected by existing anti-discrimination laws. While there were some efforts to enact a specific HIV-related civil rights law,²⁵ there were strong views in Congress, voiced by such persons as Senator Helms, which argued against creating any laws creating special rights for persons with AIDS. The public hysteria about AIDS made passage of any protective civil right legislation at the federal level unlikely if not

19. S. REP. NO. 116, at 8 (1989) (quoting REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 119 (1988)); H.R. NO. 101-485, at 31 (1990).

20. See, e.g., *In re* District 27 Community Sch. Bd., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986) (involving suit by school age HIV-infected child excluded from public school).

21. See, e.g., *Poff v. Caro*, 549 A.2d 900 (N.Y. Super. Ct. Law Div. 1987) (refusal to rent to an individual believed to be at high risk for AIDS).

22. See, e.g., Rosaline Gagliano, *When Health Care Workers Refuse to Treat AIDS Patients*, 21 J. HEALTH & HOSP. L. 225 (1988).

23. See, e.g., Jane Howard Carey & Megan M. Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284 (1987).

24. See, e.g., 1987 ALA. ACT 574; CAL. HEALTH & SAFETY CODE § 199.20-199.23 (West 1989); FLA. STAT. § 381.609 (West 1989); HAW. REV. STAT. ch. 325; ILL. REV. STAT. ch 111½, ¶ 7408 (1993); ME REV. STAT. tit. T, § 17001; MASS. GEN. LAWS ANN., ch. 111 § 70 (West 1989); N.Y. PUB. HEALTH LAW § 2782 (McKinney 1994); 1987 OR. LAWS ch. 600; R.I. LAWS § 5-5-37.3 (1999); WIS. STAT. ANN. §§ 103.15, 146.0231 146.025 (West 1989).

25. See, e.g., S. 1575, 100th Cong. (1987).

impossible. Instead, attention was directed at finding a basis for anti-discrimination protection in existing law. This view, which ultimately prevailed, was adopted in the 1988 report of the President's Commission that urged that "persons with HIV infection should be considered members of the group of persons with disabilities, not as a separate group onto themselves. Persons with HIV infection deserve the same protections as all other persons with disabilities, including those with cancer, cerebral palsy and epilepsy."²⁶

Even prior to the recommendations of the Presidential Commission, commentators urged the use of handicap legislation,²⁷ particularly section 504 of the Federal Rehabilitation Act of 1973,²⁸ that prohibited handicap discrimination, and state laws that protected handicapped individuals from employment discrimination.²⁹ Handicap discrimination law seemed an appropriate basis for protection for HIV-infected individuals because these statutes, particularly the federal handicap law, were given broad interpretation by the courts. The courts' interpretations extended protection to individuals vulnerable to discrimination due to impairments that resulted in shunning and avoidance by members of the general society.³⁰

III. REHABILITATION ACT OF 1973

The history of disability law is a relatively short one, beginning approximately twenty-five years ago with the passage of the Rehabilitation Act of 1973.³¹ However, the first major federal statute protecting individuals with disabilities was the Social Security Act of 1935³² that included provisions providing medical and therapeutic services for crippled children. Other legislation was enacted that provided rehabilitation services aimed at employability,³³ handicap accessibility to federal buildings,³⁴ and mass

26. REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 121 (1988).

27. See, e.g., Arthur S. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985); Arthur S. Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681 (1985) [hereinafter Leonard, *Employment Discrimination*].

28. 29 U.S.C. § 794 (1994).

29. See, e.g., California Fair Employment and Housing Act (FEHA), CAL. GOV'T CODE § 12920 (West 1992).

30. See, e.g., *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987) (epilepsy a handicap); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977) (individual formerly diagnosed with epilepsy protected because he was regarded as having an impairment); see also Rehabilitation Act of 1973, 29 U.S.C. §§ 790-96 (1994) (epilepsy treated as handicap).

31. 29 U.S.C. §§ 790-96.

32. 42 U.S.C. §§ 301-06.

33. See LaFollitte-Barden Act, Pub. L. No. 78-113, 57 Stat. 374 (1943), amended by the Vocational Rehabilitation Amendments, Pub. L. No. 83-565, 68 Stat. 652 (1954) (current version at 29 U.S.C. § 37-42).

34. See Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-57.

transportation.³⁵

The most significant initial disability legislation that has had importance in dealing with HIV-related discrimination is the Rehabilitation Act of 1973, which aimed at handicap discrimination in programs involving federal funding.³⁶ The three major provisions of the statute relating to different aspects of federal involvement in programs included: section 501 which established non-discrimination and affirmative action as employment requirements for federal employers;³⁷ section 503 which mandated nondiscrimination and affirmative action in the employment policies of federal contractors;³⁸ and section 504 which mandated nondiscrimination and reasonable accommodation by recipients of federal financial assistance, including educational programs, public accommodations, transportation, and health and social services.³⁹

The 1973 Rehabilitation Act protected handicapped individuals who were defined as individuals who could benefit from rehabilitation services.⁴⁰ The 1974 amendments to the Rehabilitation Act expanded the definition of handicapped individuals to include any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.⁴¹

Initially, the passage of the Rehabilitation Act was not followed by strong enforcement. Public pressure compelled the President issue an Executive Order in 1976.⁴² This order mandated that the Department of Health, Education and Welfare (HEW) issue regulations implementing the provisions of the Rehabilitation Act. In 1978, HEW promulgated regulations implementing the Rehabilitation Act of 1973 as amended.⁴³

The statute's definitional terms were refined by the HEW.⁴⁴ The promulgated regulations defined a "physical or mental impairment" as involving the following:

- (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs, respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

35. See Urban Mass Transportation Assistance Act of 1970, 49 U.S.C. §§ 1601-18.

36. See 29 U.S.C. §§ 790-96.

37. See *id.* § 791.

38. See *id.* § 793.

39. See *id.* § 794.

40. See *id.* § 706.

41. See *id.* § 706(7)(B).

42. Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976).

43. See Dep't of Health, Educ., and Welfare, 43 Fed. Reg. 2132 (1978).

44. See Dep't of Health, Educ., and Welfare, 42 Fed. Reg. 22,676 (1977).

- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁴⁵

The analysis published along with these regulations provided a list of covered diseases and conditions with a warning that the list was not comprehensive.⁴⁶ The listed diseases and conditions included "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and . . . drug addiction and alcoholism."⁴⁷

The HEW regulations further specified that major life activities include, but are not limited to, "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁴⁸ The term "substantially limits" was not defined in the regulation because it was concluded that an operating definition was not possible.⁴⁹

IV. EXTENDING PROTECTION OF SECTION 504 OF THE FEDERAL REHABILITATION ACT TO PERSONS WITH HIV INFECTION OR AIDS DIAGNOSIS

A. *Initial Commentary and Department of Justice Opinion*

The initial arguments for extension of the protection of individuals with HIV infection or AIDS under the disability discrimination prohibitions of the Rehabilitation Act of 1973 were presented in law reviews. Arthur Leonard of New York Law School published an article in 1985 entitled *Employment Discrimination Against Persons with AIDS*.⁵⁰ Leonard argued an individual with AIDS should be held to be included within the statute's first definition as a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities."⁵¹ According to Leonard, infection with HIV constitutes a physical impairment that affected the person's "ability . . . to fight infection and preserve health" that is logically a major life function.⁵²

Leonard also argued that a person with AIDS was protected within the third alternatives definition of handicapped individual in the Rehabilitation Act that protects a person who "is regarded as having such a impairment."⁵³ According

45. 45 C.F.R. 84.3(j)(2)(i) (1999); see also 28 C.F.R. 41.31(b)(1) (where the Department of Justice promulgated identical definition regulations implementing Executive Order 12,250).

46. See 45 C.F.R. 84, app. A.

47. *Id.*

48. 45 C.F.R. 84.3 (j)(2)(ii); see also 28 C.F.R. 41.21(b)(2).

49. 45 C.F.R. 84, app. A at 310.

50. Leonard, *Employment Discrimination*, *supra* note 27.

51. *Id.* at 691 (quoting 29 U.S.C. § 706(8)(B)(i) (1994)).

52. *Id.* at 696.

53. 29 U.S.C. § 706(8)(B)(iii).

to Leonard, persons who may or may not be infected with HIV, and who were denied employment because of the employer's perception that the person was infected with the virus that causes AIDS, should be held to be protected because such a person falls within the provision of the statute that protects persons who are regarded as handicapped because they are perceived as having AIDS. Thus according to Leonard, asymptomatic HIV-infected individuals, whether or not they were in fact substantially impaired, were protected by legislation whose purpose was to prevent discrimination that took the form of "animus against a class of individuals which unfairly ignores their individual qualifications and is based on prejudicial beliefs about the class."⁵⁴ Leonard's understanding of the provisions of the Rehabilitation Act, as well as his understanding of AIDS, allowed him to dismiss the need to establish an impairment resulting from HIV infection at the asymptomatic stage, and to avoid the need to identify any specific life activity significantly impacted as a result of HIV infection. For Leonard, a person who was thought to be infected with HIV was a person thought to have AIDS, a condition by its very nature affected the person's ability to fight infection or preserve health.

A very different view of the coverage of the Federal Rehabilitation Act was taken in the 1986 Memorandum from Assistant Attorney General Cooper on the application of section 504 of the Rehabilitation Act to persons who have or are regarded as having AIDS, ARC, or who test positive for "AIDS antibodies."⁵⁵ The 1986 Department of Justice ("DOJ") Office of Legal Counsel Memorandum concluded that section 504 prohibited discrimination based on the disabling effects of AIDS and the related conditions that a person with AIDS can have. On the other hand, the DOJ Memorandum concluded that an individual's real or perceived ability to transmit "the disease" [virus] did not constitute a handicap, and that discrimination on such basis did not fall within section 504.

The 1986 DOJ Memorandum took specific care to distinguish persons with AIDS from those merely infected with the "AIDS virus" based on the formal CDC case definition of AIDS, as of August 1, 1985:

A person is not considered to have AIDS merely because tests show him to be generating antibodies to the to the AIDS virus, *i.e.*, to be "seropositive." Instead a person is not considered to have AIDS even if he is seropositive, and also displays a number of symptoms characteristic of the disease. Rather, an essential element of the definition of AIDS used for reporting purposes by the Centers for Disease Centers ("CDC") is afflicted with one or more of the opportunistic diseases that take advantage of the patient's suppressed immune systems.⁵⁶

The 1986 DOJ Memorandum easily concluded that the disabling effects of

54. Leonard, *Employment Discrimination*, *supra* note 27, at 696.

55. Memorandum from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to persons with AIDS, Daily Law Rep. (BNA) No. 122 at D-1 (June 25, 1986) [hereinafter DOJ Memorandum].

56. DOJ Memorandum, *supra* note 55, at nn.16, 17 and accompanying text.

AIDS qualified it as a handicap. Citing the HHS interpretative regulations, the DOJ Memorandum determined that AIDS is a "physiological disorder or condition" affecting the "hemic [blood] and lymphatic" systems and possibly affecting the brain and central nervous system as well.⁵⁷ The DOJ Memorandum went on to conclude that this impairment substantially limited a major life activity; namely, the inability of "resisting disabling and ultimately fatal diseases, and may directly cause brain damage and disorders . . . [and] by definition involves the presence of an opportunistic disease, such as P. carinii pneumonia, that frequently will entail substantial limitations on major life activities."⁵⁸

While not specifically using the terminology "asymptomatic" in referring to a class of HIV-infected persons, the DOJ Memorandum directed considerable attention to what it characterized as an "immune carrier" or a person who was in the stage of the disease progression in which the infected person was able "to communicate the disease to another person" without otherwise experiencing "the disability effects" of AIDS.⁵⁹ The medical consensus today is that there are no immune carriers of the HIV virus. Therefore, we understand that a person who tests positive for the HIV virus is "infected" and "infectious." Previously, some medical authorities maintained that a positive HIV-antibody test meant only that the individual had been exposed to the virus. Ultimately, the DOJ Memorandum asserts there is no distinction to be drawn between an immune carrier and a carrier who will subsequently develop the diseases characteristic symptoms.⁶⁰ The DOJ Memorandum concluded that an "immune carrier" would not have a physical or mental impairment: "[T]he carrier's condition—the presence within his body of the active infectious agent—has no physical consequence for him."⁶¹ Moreover, the DOJ Memorandum went on to argue that even if the carrier of the virus had an impairment it does not substantially limit any of the major life activities listed in the "HHS regulation—*i.e.*, caring for [him]self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."⁶² Specifically, the DOJ Memorandum rejected the fact that the carrier of the "AIDS virus" was subjected to social or professional discrimination. According to the view of the DOJ Memorandum, a person cannot be regarded as handicapped simply because others shun him; otherwise, personal traits such as ill-temper and poor personal hygiene would constitute a handicap in contradiction to the applicable HHS regulations.⁶³

The 1986 DOJ Memorandum drew a significant distinction between HIV-infected persons, for example distinguishing those with physically apparent symptoms and those whose infection was not apparent to the casual observer, in applying the third definitive category of perceived or regarded as having an

57. *Id.* (applying 45 C.F.R. § 84.3(j)(2)(i) (1984)).

58. *Id.* at n.65 and accompanying text.

59. *Id.* at n.67 and accompanying text.

60. *See id.* at n.71 and accompanying text.

61. *Id.* at n.66 and accompanying text.

62. *Id.* (applying 45 C.F.R. 84.3(j)(2)(ii) (1986)).

63. *See id.* (citing 45 C.F.R. 84, App. A at 310).

impairment. Even though an HIV-infected person ["a person who tests positive for HTLV - - III/LAV antibodies"] does not have an impairment that substantially limits any major life activity, the DOJ Memorandum does conclude: "this person may still be handicapped under section 504 if he is perceived as suffering from the disabling effects of AIDS or ARC."⁶⁴ However, the DOJ Memorandum reiterates that neither the ability to communicate the virus nor the incorrect belief that the individual can communicate the virus constitute a handicap. The DOJ Memorandum goes on to concede that in certain circumstances a person who is not infected with HIV may be protected by the Rehabilitation Act even though they clearly do not have any impairment that substantially limits a major life activity. According to the DOJ Memorandum, "[I]f such an individual is inaccurately perceived as suffering from the disabling effects of AIDS or ARC—perhaps because of membership in a high risk groups—this perceived impairment would constitute a handicap."⁶⁵

B. The Arline Opinion of the United States Supreme Court and the Second Department of Justice Opinion

The United States Supreme Court in 1987 decided the case of *School Board of Nassau County, Florida v. Arline*.⁶⁶ The Court held that a school teacher diagnosed with contagious tuberculosis was a "handicapped individual" within the meaning of section 504 of the Rehabilitation Act of 1973.⁶⁷ While the Court did not specifically address the subject of AIDS or HIV infection,⁶⁸ the opinion in *Arline* played a pivotal role in the development of federal disability law as applied to AIDS and HIV infections because of the communicable nature of HIV.

Gene Arline, an elementary school teacher, was discharged in 1979 by the School Board of Nassau County that employed her after she experienced a third relapse of tuberculosis within a two year period.⁶⁹ Prior to being terminated, Arline had twice been suspended with pay in 1978 after testing positive for tuberculosis. At the close of the 1978-1979 school year, Arline was discharged because of her medical condition.⁷⁰

While concluding that the plaintiff suffered a handicap, the district court held that she was not a "handicapped person" within the meaning of section 504 of the Rehabilitation Act. The district court found it "difficult . . . to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person."⁷¹ The district court went on to hold that even if a person with a contagious disease could be deemed a handicapped person, Arline was not

64. *Id.* (applying 29 U.S.C. § 706(7)(B)(iii)).

65. *Id.* at n.75 and accompanying text.

66. 480 U.S. 273 (1987).

67. 29 U.S.C. § 794 (1994).

68. *See Arline*, 480 U.S. at 288.

69. *See id.* at 276.

70. *See id.*

71. *Id.* at 277 (citation omitted).

qualified to teach because she had a contagious disease that might be communicated to her students or fellow teachers.⁷²

On appeal, the Court of Appeals for the Eleventh Circuit reversed the district court decision and held that a person with a contagious disease is handicapped within the meaning of section 504 of the Rehabilitation Act.⁷³ The court of appeals remanded the case for findings with respect to the questions whether there were actual risks of infection that would preclude Arline from being qualified for the teaching job, and if so, whether the school could reasonably accommodate her in a non-teaching job or other position.

Affirming the Eleventh Circuit, the United States Supreme Court (7-0) held that Arline was handicapped within the meaning of section 504 of the Rehabilitation Act.⁷⁴ The Court's opinion directed attention at the regulations promulgated by the United States Department of Health and Human Services (HHS) that define the terms used in the Rehabilitation Act's statutory definitions of handicapped individuals, specifically "physical impairment" and "major life activities."⁷⁵ The Court noted that impairment is defined as including any physiological disorder or condition, cosmetic disfigurement, or anatomical loss which affects one or more specified body systems.⁷⁶ The Court also took note that specified major life activities include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁷⁷

The Court concluded that Arline "had a physical impairment," as that term is defined in the Department of Health and Human Services Regulation because she had a physiological disorder or condition that affected her respiratory system.⁷⁸ The fact that Arline was hospitalized in 1957 because of the same impairment was sufficient to establish that one or more of her major life activities were substantially limited by her impairment, and her previous hospitalizations also established that Arline had a record of such impairment within the definitional terms of the Rehabilitation Act.

The defendant school board conceded that a contagious disease could constitute an impairment to the extent that a person's physical or mental capacities were diminished, and further conceded that Arline's hospitalization in 1975 for tuberculosis established a record of physical impairment. However, the defendant argued that this impairment and record of impairment were irrelevant since Arline was terminated, not because of her diminished physical or mental capacity, but because of the threat of contagion that her tuberculin condition posed to others.

72. *See id.*

73. *See Arline v. School Bd. of Nassau County*, 772 F.2d 759 (11th Cir. 1985), *aff'd*, 480 U.S. at 273.

74. *See Arline*, 480 U.S. at 273.

75. *Id.* at 281 (citing 45 C.F.R. § 84.3(j)(2)(i), (ii) (1984)).

76. *See id.* at 280 (citing § 84.3(j)(2)(i)).

77. *Id.* (citing § 84.3(j)(2)(ii)).

78. *Id.* at 282.

The Court majority rejected the School Board's arguments on the basis that the unobservable effects of a contagious or communicable disease on an individual cannot be meaningfully distinguished from the disease's physical effects on the infected person.⁷⁹ The Court reasoned that Arline's contagiousness and her physical impairment resulted from the same condition and that it would be unfair to allow employers to rely on a distinction between the effects of a disease on a patient and the effects of the disease on others to justify discrimination. The Court noted that prejudicial attitudes, ignorance, myths, and fears about disability, disease, and contagiousness were meant to be eliminated by the Rehabilitation Act's enforcement based on reasoned and medically sound judgments. The Court emphasized, "[T]he fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases."⁸⁰

Turning to the question of whether Arline was otherwise qualified as an elementary school teacher, the Court found a need to remand the case to the district court for a determination as to whether Arline was otherwise qualified. The Court provided some guidance by instructing the district court that in making findings of fact with regard to job qualification, the district court should normally defer to the reasonable judgments of public health officials.⁸¹ The Court made it clear, however, that a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be found qualified for employment if reasonable accommodation would not eliminate that risk.⁸² On remand, the district court held that Arline was an otherwise qualified person under the Rehabilitation Act and ordered that she be reinstated to her position as a school teacher.⁸³

Even at the time that *Arline* was being argued in the Supreme Court, an effort was made to determine the significance of the opinion for persons with AIDS and HIV infection. In fact, the question of whether AIDS constitutes a handicap under the Rehabilitation Act implicitly was raised by the United States, appearing as *amicus curiae*. The Solicitor General argued that it is possible for an individual to be a carrier of a disease, "that is, to be capable of spreading a disease without having a 'physical impairment' or suffering from any symptoms associated with the disease."⁸⁴ Asserting that this was an accurate description of carriers of the "AIDS virus," the Solicitor General argued that discrimination solely on the basis of contagion could never constitute discrimination on the basis of handicap. This is, of course, a central argument made in the 1986 Memorandum of the Department of Justice's Office of Legal Counsel.⁸⁵ Both the

79. *See id.*

80. *Id.* at 285.

81. *See id.* at 288.

82. *See id.*

83. *See Arline v. School Bd. of Nassau County*, 692 F. Supp. 1286 (M.D. Fla. 1988).

84. *Arline*, 480 U.S. at 282 n.7 (citation omitted).

85. *See supra* notes 55-65 and accompanying text.

position of Solicitor General and the 1986 DOJ Memorandum were based on what is known to be the mistaken position that there are carriers of HIV who are not themselves infected and experiencing the effects of such infection on the compromise of their immune system and reduction in their white blood cell count. The Court, however, found it unnecessary to address the Solicitor General's argument because the disease at issue in *Arline*, tuberculosis, involved both physical impairment and contagiousness. Thus, the Court concluded, "[W]e therefore, do not reach the question whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered, solely on the basis of contagion, a handicapped person as defined by the [Rehabilitation] Act."⁸⁶

The Legal Counsel's office of the Department of Justice was asked in 1988 to revisit the question of the applicability of section 504 of the Rehabilitation Act of 1973 to persons infected with HIV in light of the opinion of the United States Supreme. In a memorandum of September 27, 1988, an opinion was offered that section 504 protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program or activity on the basis of any actual, past or perceived effect of HIV infection that substantially limits any major life activity (1) in the non-employment context, so long as the HIV infected individual is "otherwise qualified to participate in the program or activity; and (2) in the employment context so long as the HIV infected individual is able to perform the duties of the job and does not constitute a direct threat to the health or safety of others."⁸⁷ This latter distinction reflects the terms of the Civil Rights Restoration Act which replaced the "otherwise qualified" standard with the formulation set out above.⁸⁸

The 1986 DOJ Memorandum specifically supercedes the 1986 opinion from Charles Cooper.⁸⁹ Persons with HIV infection are characterized as either symptomatic HIV-infected individuals, including persons with AIDS or ARC, or asymptomatic HIV-infected individuals.⁹⁰ The memorandum adopts the position that available medical information established that HIV infection is a physical impairment which in any given case may substantially limit a person's major life activities; in addition, the memorandum recognized that others may regard an HIV-infected person as being so impaired.⁹¹ The memorandum also responded to the issue raised by the discussion in the *Arline* opinion of whether there are carriers of the "AIDS virus" that do not have any physical impairment: "By

86. *Arline*, 480 U.S. at 282 n.7.

87. See Memorandum from Acting Assistant Attorney General Douglas Kamiec on Application of Rehabilitation Act's Section 504 to HIV-infected Persons, Daily Law Rep. (BNA) No. 195 at D-1 (Oct. 7, 1988) [hereinafter DOJ Memorandum-II].

88. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 9, 102 Stat. 28, 31-32 (1988) (amending 29 U.S.C. § 706) (precluded attempt to remove contagious disease from the definition of handicap under the Rehabilitation Act and codified in part the holding in *Arline*).

89. See DOJ Memorandum II, *supra* note 87, at n.4.

90. See *id.* at n.2.

91. See *id.* at n.3.

virtue of the fact that the handicap here, HIV infection, given rise both to disabling physical symptoms and to contagiousness."⁹² The memorandum concluded, "[T]he medical information available to us undermined the accuracy of the assumption or contentions referenced in *Arline* that carriers of the AIDS virus are without physical symptoms."⁹³

The 1988 DOJ Memorandum concluded that all symptomatic HIV-infected individuals are handicapped under section 504.⁹⁴ This conclusion was based on the finding that in symptomatic patients or patients with AIDS, HIV infection has progressed to the point where the immune system has been sufficiently weakened so that opportunistic infection or disease, such as cancer or pneumonia, has developed. According to the DOJ view, the substantial limiting effects that the clinical symptoms have on many major life handicaps are such that every symptomatic HIV-infected person is an individual with handicaps for purposes of section 504.

Asymptomatic HIV-infection is given greater attention in the 1988 DOJ Memorandum since the author of the opinion recognized that *Arline* did not resolve the application of section 504 to asymptomatic HIV-infected individuals.⁹⁵ The DOJ Memorandum identifies the three areas of inquiry required to determine whether an asymptomatic HIV-infected individual is a person with a handicap. These include: (1) whether HIV infection by itself is a physical or mental impairment; and (2) whether this impairment substantially limits a major effect, i.e., whether it has a disabling effect; or (3) whether an individual with HIV infection is regarded as having an impairment which substantially limits a major life activity.⁹⁶

The DOJ Memorandum places heavy reliance on the views expressed by the Public Health Service, especially by the Surgeon General of the Public Health Service, Dr. C. Everett Koop, in deciding whether HIV-infection alone is an impairment, i.e., whether the asymptomatic HIV-infected individual has an impairment. Dr. Koop reported that HIV infection is the starting point of a single disease process that progresses through a continuum of stages, rather than involving a series of discrete illness. The Surgeon General concluded that "from a purely scientific perspective, persons with HIV infection are clearly impaired."⁹⁷ According to Dr. Koop, asymptomatic HIV infected persons are not comparable to immune carriers of a contagious disease such as hepatitis B. Like a person in the early stages of cancer, asymptomatic HIV infected persons may appear outwardly healthy, but are in fact seriously ill."⁹⁸

92. *Id.*

93. *Id.*

94. *See id.* at (II)(A).

95. *See id.* at n.8.

96. *See id.*

97. *Id.* (citing letter of Surgeon General C. Everett Koop to Acting Assistant Attorney General Douglas Kmiec).

98. *Id.* (citing letter of Surgeon General C. Everett Koop to Acting Assistant Attorney General Douglas Kmiec).

In order to determine the meaning of the statutory term “physical impairment,” the 1988 DOJ Memorandum placed specific reliance on the regulations promulgated by the Department of Health and Human Services defining the term as:

[A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin; and endocrine.⁹⁹

In addition to the regulations, the 1988 DOJ Memorandum noted the existence of an appendix to the HHS regulations that provided an illustrative, although not exhaustive, list of diseases and conditions that are “physical impairments” for purposes of section 504: “such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer and heart disease, diabetes, mental retardation [and] emotional illness, and . . . drug addiction and alcoholism.”¹⁰⁰

The 1988 DOJ Memorandum proceeded to apply the HHS regulations and commentary to the factual description given by the Surgeon General of the condition of the asymptomatic HIV-infected individual, concluding that this medical condition meets the HHS definition of “physical impairment” because it is a “physiological disorder or condition” which affects the “hemic and lymphatic” systems of the HIV-infected individual.¹⁰¹

The 1988 DOJ Memorandum moved on to the second question: whether the impairment caused by HIV-infection substantially limits any major activities in the asymptomatic individual. The author of the memorandum found some guidance in the illustrative, but not exhaustive, HHS regulations implementing section 504 which define “major life activities” to include such functions as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”¹⁰² The 1988 DOJ Memorandum acknowledged that it is not so readily apparent that asymptomatic, HIV-infected persons are substantially limited in major life activities because they have no obvious disabling physical effects resulting from their HIV infection. These asymptomatic individuals appear able to work, to care for themselves, to perform manual tasks, and fully to use their senses.

The 1988 DOJ Memorandum identified procreation and intimate personal relations as two of the most significant major life activities substantially limited by HIV infection.¹⁰³ Although these activities are not listed in the HHS regulations, the 1988 DOJ Memorandum emphasized that the list provided by HHS is to be taken as illustrative and not as complete or exhaustive.

99. *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(1) (1987)).

100. *Id.* (quoting 45 C.F.R. § 84. App. A, pt. 344).

101. *Id.* (citation omitted).

102. *Id.* (quoting § 84.3(j)(2)(ii)).

103. *See id.* at Part II (B)(2).

The 1988 DOJ Memorandum maintained that the major life activity of procreation, the process of impregnating, conceiving, bearing and giving birth to a healthy child, is substantially limited in the case of asymptomatic HIV-infected individuals. This conclusion was based on the significant risk that HIV will be transmitted during pregnancy or at birth so that infected males and females cannot engage in the process of procreation with the assured expectation of producing a healthy child. The 1988 DOJ Memorandum concluded, "There is little doubt that procreation is a major life activity and that the physical ability to engage in normal procreation—procreation free from the fear of what the infection will do to one's child—is substantially limited when an individual is infected with the AIDS virus."¹⁰⁴

According to the 1998 DOJ Memorandum, a second major life activity, which may or may not have the purpose of procreation, but is limited by HIV infection is intimate sexual relations. Because of the danger of infecting a sexual partner, the HIV infected individual is faced with the need to modify his or her intimate sexual relations, or to adopt a program of abstinence, in order to avoid infecting a sexual partner. The 1988 DOJ Memorandum concluded: "The life activity of engaging in sexual relations is threatened and probably substantially limited by the contagiousness of the virus."¹⁰⁵

The 1988 DOJ Memorandum explicitly rejected the argument that HIV infection does not physically prevent procreation or intimate sexual relations, but that it is the ethical sense or the personal decision of the asymptomatic HIV-infected person not to engage in the activities that results in any limitations on sexual relations experienced by such an individual. The memorandum does not provide any significant analysis of this issue except to anticipate that a court could find, despite the element of personal decision involved, that HIV infection had limited these major life activities.

The 1988 DOJ Memorandum further examined the alternative basis for determining a person is a handicapped individual because the person is regarded by others as having a limitation of major life activities whether they do or not.¹⁰⁶ The memorandum cited the *Arline* opinions and the legislative history of the 1974 amendments to the Rehabilitation Act to establish the proposition that this added text meant an impaired person could be protected even if the impairment "in fact does not substantially limit that person's functioning."¹⁰⁷ According to the 1988 DOJ Memorandum, "The effect of this interpretation is that the perceived impairment need not directly result in a limitation of a major life activity, so long as it has the indirect effect, due to the misperceptions of others, of limiting a life activity (in *Arline*, the activity of working)."¹⁰⁸

The 1988 DOJ Memorandum examined the "otherwise qualified"

104. *Id.* at n.13.

105. *Id.* at n.12.

106. *See id.* at n.14 (construing 29 U.S.C. § 706(8)(B)(iii) (1994)).

107. *Id.* (citing S. REP. NO. 127, at 64 (1974)).

108. *Id.* at n.14.

requirement of section 504.¹⁰⁹ The memorandum concluded that based on existing scientific and medical knowledge, in most situations the risk of transmission of HIV is so slight that there will seldom be any justification for treating HIV infected individuals differently than others based on fear of contagion.¹¹⁰ In those individuals with only "subclinical manifestations," the 1988 DOJ Memorandum concludes that it is unlikely that asymptomatic individuals would not be able to participate in any covered program by reason of disease-related inability to perform. As the individual's disease progresses and more significant clinical manifestations occur, individualized evaluation of HIV-infected person's ability to perform becomes more appropriate under the terms of the Rehabilitation Act. Possible transmission in surgical settings, or concern with effects of HIV-related dementia in sensitive positions such as air traffic controllers, were identified as the type of situations where justification might be established for treating HIV infected individuals differently from unimpaired individuals.¹¹¹

C. Case Law Extending Protection Under Rehabilitation Act to HIV-Infected Individuals

Many of the federal courts that considered the application of the Rehabilitation Act of 1973 and the state courts construing state laws that were based on the federal statute in cases involving persons with HIV-infection, initially proceeded on the assumption that there was a difference in the condition of those persons with AIDS diagnosis and persons who were HIV infected but asymptomatic. Nevertheless, every court that considered the application of the Rehabilitation Act to HIV-infected persons whether asymptomatic or symptomatic found the individuals protected by the Rehabilitation Act or involving application of those state laws modeled on the federal statute.¹¹² While some of these courts directed attention to the requirements of an "impairment"

109. *Id.* at Part II(C).

110. *See id.* at n.17.

111. *See id.* (referring to Surgeon General's Report on Acquired Immune Deficiency Syndrome (1986)).

112. *See* Chalk v. United States Dist. Ct., 840 F.2d 701 (9th Cir. 1988); Doe v. Dalton Elementary Sch. Dist. No. 148, 694 F. Supp. 440 (N.D. Ill. 1988); Robertson v. Granite City Community Unit Sch. Dist. No. 9, 684 F. Supp. 1002 (S.D. Ill. 1988); Doe v. Centinela Hosp., No. CV 87-2514 PAR(PX), 1988 WL 81776 (C.D. Cal. June 30, 1988); Martinez v. School Bd., 675 F. Supp. 1574 (M.D. Fla. 1987); Doe v. Belleville Pub. Sch. Dist., 672 F. Supp. 342 (S.D. Ill. 1987); Ray v. School Dist. of DeSoto County, 666 F. Supp. 1524 (M.D. Fla. 1987); Thomas v. Atascadero Unified Sch. Dist., 662 F. Supp. 376 (C.D. Cal. 1987); American Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987); Shuttleworth v. Broward County, 649 F. Supp. 35 (S.D. Fla. 1986); Raytheon Co. v. California Fair Employment 2nd Hous. Comm'n, 261 Cal. Rptr. 197 (Cal. Ct. App. 1989); Board of Educ. v. Cooperman, 507 A.2d 253 (N.J. Super. Ct. App. Div. 1986), *aff'd*, 523 A.2d 655 (N.J. Sup. Ct. 1987); District 27 Community Sch. Bd. v. Board of Educ., 502 N.Y.S.2d 325 (N.Y. Sup. Ct. 1986).

that "substantially limited a major life activity,"¹¹³ many courts simply presumed an HIV-infected person was a "person with handicaps."¹¹⁴ Much of the focus of these court opinions was whether the handicapped person was "otherwise qualified," and in that context, whether the HIV-infected person's communicable disease was a threat to others.¹¹⁵ Every reported decision construing the protection of the Rehabilitation Act of 1973 up to the passage of the Americans with Disabilities Act in 1990 found HIV-infection, whether it resulted in an AIDS diagnosis or was asymptomatic, to meet the criteria for establishing that HIV-infected individuals were "persons with handicaps." The following discussion of judicial opinions will examine typical cases that take the position that HIV-infection, whether it resulted in AIDS or whether the infected individual remained asymptomatic, meets the requirements for establishing a "person with handicaps."

D. Individual with AIDS Diagnosis Is Handicapped: Chalk v. United States District Court for the Central District of California

The first federal court of appeals decision to address the treatment of AIDS as a handicap under the Rehabilitation Act was *Chalk v. United States District Court* decided by the Ninth Circuit in 1988.¹¹⁶ The court found that a teacher diagnosed with AIDS was handicapped and qualified for employment within the meaning and coverage of the Rehabilitation Act, as construed by the United States Supreme Court in *Arline*.¹¹⁷ The court of appeals did not find it necessary to determine the existence of an "impairment" that "substantially limits one or more of such person's major life activities"; assuming these elements were satisfied, the court focused on the "direct threat" issue. The court was persuaded that medical and scientific evidence established that the virus causing AIDS could not be transmitted through normal classroom contact.

The petitioner, Chalk, a teacher of hearing-impaired student, was hospitalized with pneumocystis carinii pneumonia and diagnosed as having AIDS. After eight weeks, the teacher was released to return to work by his physician. However, the county department of education, Chalk's employer, placed him on administrative leave pending the medical opinion of the county health director that Chalk was fit to return to work. The county health director subsequently informed the employer that the teacher posed no risk of infecting his students or others with the virus causing AIDS.¹¹⁸ After the close of the school year, the employer offered the teacher an administrative position, at the same rate of pay and benefits, with the option of working at the education department's offices or at

113. See, e.g., *Centinela Hosp.*, 1988 WL 81776.

114. See, e.g., *Chalk*, 840 F.2d at 701.

115. *Id.*

116. See *id.*

117. See *id.* at 871 (applying *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987)).

118. See *id.* at 703.

his home. The employer also advised the teacher that his insistence on returning to the classroom would be met by an effort to obtain court-ordered declaratory relief. When Chalk insisted on returning to teaching, the employer filed a state court action. Chalk responded by filing a federal court suit seeking a preliminary and permanent injunction barring the employer from excluding him from the classroom. Instead of pursuing its state court suit, the employer counterclaimed in a federal court action.¹¹⁹

The federal district court denied the teacher's motion for a preliminary injunction. The court then addressed each of the four factors set out in *Arline* for determining whether a person was "otherwise qualified" in terms of the risk of transmission of a contagious disease:

- (1) the nature of the risk (how the disease is transmitted),
- (2) the duration of the risk (how long is the carrier infectious),
- (3) the severity of the risk (what is the potential harm to third parties),
- (4) the probabilities that the disease will be transmitted and will cause varying degrees of harm.¹²⁰

The court found, based on current medical and scientific knowledge, that in the case of a person infected with the virus that causes AIDS:

- (1) the duration of the risk of infection was long,
- (2) the severity of the risk was catastrophic,
- (3) transmission of the disease appeared unlikely to occur, and
- (4) the probability that the disease would cause harm to others in the workplace setting was minimal.¹²¹

However, the district court remained uncertain about the strength of the medical understanding of AIDS, about scientific knowledge of HIV transmission because of the relatively limited time for actual observation of the AIDS epidemic, and about the risk that the "almost inevitable mutation of the virus" could lead to new transmission routes.¹²² Due to this uncertainty, the court denied the teacher's motion. Further, the district court concluded that the teacher's injury was outweighed by the fear likely to be produced by his presence in the classroom. The employer reassigned the teacher to an administrative position coordinating grant applications and materials for the hearing impaired program.

The Ninth Circuit reversed the District Court focusing primarily on the "otherwise qualified" element of the Rehabilitation Act assuming that the elements needed to establish that the petitioner was "an individual with handicaps" were met. Because the posture of the case was a denial of a motion for a preliminary and permanent injunction, the court of appeals framed the issue as whether the teacher could demonstrate the required probability of success on

119. *See id.*

120. *Id.* at 706-07 (citing *Arline*, 480 U.S. at 286 (quoting Brief of the American Medical Association as amicus curiae in *Arline* at 28)).

121. *Id.* at 706.

122. *Id.* at 707.

the merits of a permanent injunction. The court of appeals began with a review of the *Arline* holding by framing the issue in the following terms: "[T]he question which is of central importance to this case: under what circumstances may a person handicapped with a contagious disease be 'otherwise qualified' within the meaning of Section 504?"¹²³

The court of appeals recognized the four factors set out in the *Arline* opinion to be the determinative considerations that need to be examined in handicap cases involving contagious diseases.¹²⁴ The court noted that the petitioner had submitted evidence to the district court of over one hundred medical journal articles and the statements of five AIDS experts, submissions that revealed "[a]n overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS."¹²⁵ The court observed that all published studies "have consistently found no apparent risk of HIV infection to individuals exposed through close, non-sexual contact with AIDS patients."¹²⁶ In support of its findings, the court cited:

- (1) the Surgeon General's report that found no known risk of non-sexual infection by everyday contact or in the school settings,¹²⁷
- (2) reports of the Centers for Diseases Control,
- (3) a report of the Institute of Medicine of the National Academy of Sciences, and
- (4) an amicus brief filed by the American Medical Association in support of the petitioner's position on appeal.¹²⁸

The court of appeals concluded that the district court had failed to properly apply the *Arline* four part analysis and had improperly placed the burden of proof on the teacher. The court interpreted *Arline* as permitting discriminatory exclusion only where there is a significant risk of communicating an infectious disease to others. Further, the court of appeals found that the district court ignored the admonition in *Arline* to defer to the reasonable medical judgment of public health officials. The Ninth Circuit held that, rather, the lower court improperly relied on speculation and rejected the overwhelming consensus of medical opinion. Finding that *Chalk* had demonstrated a strong probability of success on the merits, the Ninth Circuit held that it was error to require the teacher to disprove all theoretical possibilities of harm.¹²⁹

The Ninth Circuit also ruled that the teacher's injury outweighed any harm to the employer. The court noted that there was no evidence of significant risk to children or others at the school resulting from the teacher's presence and that

123. *Id.* at 705.

124. *See id.* at 706.

125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.* (quoting United States Public Health Service's Surgeon General's Report on Acquired Immune Deficiency Syndrome (1986)).

129. *See id.* at 707.

a decision based on fear would frustrate the goals of the Rehabilitation Act. The court did recognize that the district court would have to deal with the apprehension of the school community and the likely progress of the teacher's disease. As the teacher would be susceptible to opportunistic infections which themselves would be communicable, the Ninth Circuit instructed the district court to determine reasonable procedures, including periodic reports from the teacher's doctors, to assure that no significant risk of harm would arise from the teacher's classroom presence.¹³⁰

The court in *Chalk* apparently assumed that the *Arline* opinion established that individuals with an AIDS diagnosis are handicapped and that it is unnecessary in subsequent litigation for a court to make a case-by-case analysis to determine that individuals with AIDS are "persons with handicaps." The analysis undertaken by the court of appeals was limited to a determination of whether the presumed handicapped individual was "otherwise qualified." In making this determination, the court applied the factors outlined in *Arline* and relied on established medical and scientific evidence to determine whether there was any danger of transmission of the particular communicable virus that infects the person with AIDS. The Ninth Circuit accepted the reported consensus in medical knowledge about AIDS as the benchmark by which special treatment of persons with AIDS must be evaluated.

*E. Asymptomatic HIV-Infection Individual Perceived as Handicapped:
Doe v. Centinela Hospital*

In *Doe v. Centinela Hospital*,¹³¹ decided in 1988, a California federal district court found an asymptomatic HIV-infected individual to be properly excluded from a federally funded hospital's residential drug and alcohol program because of fear of contagion, and to be handicapped within the terms of section 504 of the Rehabilitation Act of 1973.

The plaintiff charged the hospital with a violation of section 504 on the ground that he was a "seropositive" individual, thus an "individual with handicaps" excluded from a covered program.¹³² The plaintiff had been discharged from the hospital's rehabilitation program after he tested positive on an HIV-antibody test. The court found that a positive test result indicated that a person was infected with HIV and capable of transmitting the virus to others.¹³³

The court acknowledged the requirements of the HHS regulations for determining whether a person is handicapped; namely if he "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, or (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."¹³⁴

130. *See id.* at 712.

131. No. CV87-2514 PAR (PX), 1988 WL 81776 (C.D. Cal. June 30, 1988).

132. *Id.* at *1.

133. *See id.* at *6 (citing 29 U.S.C. § 706(8)(b)).

134. *Id.* at *5 (citation omitted).

In applying this criteria, some confusion arose as a result of the plaintiff's effort to identify what "major life activity" was at issue. The plaintiff first argued that limiting his "access to health care" constituted a limitation of a major life activity that is limited by his being regarded as handicapped; alternatively he argued that he was regarded as handicapped and because "his reproductive system" was indisputably impaired, he meets the elements set out in the HHS regulations.¹³⁵

The court viewed the case as one involving the question of whether the plaintiff is "regarded as having such an impairment."¹³⁶ Specifically, the court avoided the issue of whether all asymptomatic HIV-infected persons are handicapped. According to the court, "On the record adduced in this case, it is necessary only to address the question whether [the hospital] regarded this plaintiff as having a disabling handicap; it is not necessary to reach the broader question whether asymptomatic HIV carriers are in all cases protected by § 504."¹³⁷

The court was able to side-step the question of whether the two major life activities identified by the plaintiff met the statutory criteria and whether, in fact, the plaintiff's infection limited the plaintiff's ability to engage in the activities. Instead, the court found that the discrimination by the hospital based on the plaintiff's infection did substantially limit his ability to obtain treatment for his addiction.¹³⁸ It is significant that the court did not identify a life activity that was directly impacted by HIV infection, but instead the court identified a life activity limited as a result of discrimination occasioned by the fact the patient was infected with HIV.¹³⁹ The approach of the court is clearly revealed in its language: "There is no dispute that [the hospital] perceived plaintiff to have precisely the condition [physical impairment] that he actually has and treated him on that account as limited in his ability to learn how to deal with a dependency [a major life activity] in the [covered] program."¹⁴⁰ As if to emphasize this view of the elements to be proven, the court asserted that "'major life activities' include learning. Therefore, given the fact that impairment is uncontroverted, and plaintiff's condition was treated by [the hospital] as limiting a major life activity, the only question is whether that limitation was substantial."¹⁴¹

The court concluded that the hospital's concern with the potential for transmission of HIV totally precluded the patient from participating in the drug treatment program and, therefore, the exclusion substantially limited a major life activity of the patient despite the fact that there were alternative out-patient programs available.¹⁴² The court decided that the only issue to be resolved was

135. *Id.*

136. *Id.*

137. *Id.*

138. *See id.* at *7.

139. *See id.*

140. *Id.* at *6.

141. *Id.*

142. *See id.* at *7.

whether the patient was "otherwise qualified" and remanded the case for trial on that issue.¹⁴³

The opinion in *Doe v. Centinela* is significant both for what it did and did not decide. The court avoided determining whether all asymptomatic HIV-infected persons were "individuals with handicaps." However, the opinion broadened the basis for establishment of whether a person with an impairment is handicapped by allowing a showing that discrimination that followed from a perception that the person is handicapped resulted in interference with a major life activity, rather than requiring that the impairment directly result in a substantial limitation of a major life activity.

*F. Asymptomatic HIV-Infected Individual Is Per Se Handicapped:
Thomas v. Atascadero Unified School District*

The view that asymptomatic HIV-infected persons are per se handicapped under the Rehabilitation Act of 1973 was adopted by a federal district court in California in 1986 in *Thomas v. Atascadero Unified School District*.¹⁴⁴ The court entered a permanent injunction in favor of a HIV-infected kindergarten student who had been expelled from school after biting another child. The court found the HIV-infected child handicapped under the Rehabilitation Act and ordered the defendant school district to allow the child to attend regular kindergarten classes.¹⁴⁵

The court, relying on the Centers for Diseases Control's expertise, determined that infection with HIV involved a range of symptoms ranging from early acute, though transient, manifestations of infection, asymptomatic infection, persistent swollen lymph-nodes and the presence of opportunistic disease and/or rare type of cancer.

The court concluded that all phases of HIV infection constitute an impairment and that infection inevitably substantially limits some major life functions of every infected person.¹⁴⁶ The court reasoned as follows:

Individuals in all four of the CDC classifications [of HIV disease] suffer from impairments to their physical symptoms. Persons infected with the AIDS virus suffer significant impairments of their major life activities. People infected with the AIDS virus may have difficulty caring for themselves, performing manual tasks . . . learning and walking, among other life functions. Even those who are asymptomatic have abnormalities in their hemic and reproductive systems making reproduction and childbirth dangerous to themselves and others.¹⁴⁷

The court concluded that asymptomatic HIV-positive individuals are

143. *Id.* at *7-11.

144. 662 F. Supp. 376 (C.D. Cal. 1986).

145. *See id.* at 381.

146. *See id.* at 379.

147. *Id.*

handicapped under the Rehabilitation Act.¹⁴⁸

Since the plaintiff was a kindergarten child, the court obviously found no need to inquire into whether the plaintiff intended to have children, but for having contracted HIV-infection. The court basically eschewed a case-by-case analysis with the effect that asymptomatic HIV-infected persons were viewed as per se "persons with handicaps."¹⁴⁹

V. AMERICANS WITH DISABILITIES ACT OF 1990

The Americans with Disabilities Act of 1990 ("ADA")¹⁵⁰ is an omnibus federal anti-discrimination law prohibiting discrimination against persons with disabilities in employment,¹⁵¹ government programs and services,¹⁵² public accommodations and services,¹⁵³ and telecommunications.¹⁵⁴ The ADA replaces the word "handicap" found in the Rehabilitation Act of 1973¹⁵⁵ with the term "disability" in order to avoid what some considered unfavorable connotations of the former usage.¹⁵⁶ In order to come under the protection of the ADA, an individual must satisfy the definition of disability developed in the statute and as promulgated in regulations by the Congressionally delegated agencies. For example, under Title I of the ADA the designated agency is the Equal Employment Opportunity Commission ("EEOC").¹⁵⁷ The EEOC issued regulations along with interpretative guidelines on June 26, 1991.¹⁵⁸ The legislative history of the ADA reveals that the relevant case law interpreting the Rehabilitation Act of 1973 should generally be applied when interpreting not only the term disability, but also the other language in the ADA.¹⁵⁹ The ADA specifically provides that it shall not invalidate or limit the remedies and rights available under any other federal or state laws that provides greater or equal protection for the rights of individuals with disabilities.¹⁶⁰

The ADA contains four substantive parts or titles with a fifth title covering enforcement provisions and exemptions. Title I regulates employment relations and prohibits employers from discriminating against any qualified individual

148. *See id.* at 381.

149. *See id.* at 381-82.

150. 42 U.S.C. §§ 12,101-12,213 (1994).

151. *See* 42 U.S.C. §§ 12,111-12,117.

152. *See id.* §§ 12,131-12,134.

153. *See id.* §§ 12,141-12,165.

154. *See id.* §§ 12,181-12,189.

155. 29 U.S.C. § 706(8)(b).

156. *See* 42 U.S.C. § 12,101(b).

157. *See id.* § 12,117.

158. *See* 29 C.F.R. § 1630.1 (1987); 56 Fed. Reg. 35,726 (1991).

159. *See* H.R. REP. NO. 485, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332-66; H.R. REP. NO. 485, at 27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 450-54; S. REP. NO. 116, at 21 (1989).

160. *See* 42 U.S.C. § 12,201(b).

with a disability with regard to hiring, promoting, firing or any term or condition, or privilege of employment.¹⁶¹ Title II of the ADA prohibits discrimination in public services, and also imposes an accommodation requirement on state and local government providers of services.¹⁶² Title III prohibits discrimination in places of public accommodation and commercial facilities and requires the design of new facilities to provide access for the disabled.¹⁶³ Title IV relates to telecommunication and common carriers,¹⁶⁴ imposing, for example, requirements for telephone communications for speech and hearing impaired individuals.¹⁶⁵

The ADA definition of "a person with a disability"¹⁶⁶ tracks the definition of "a person with handicaps" under the Rehabilitation Act of 1973.¹⁶⁷ An individual has a disability under the ADA if any one of three circumstances is present: (1) has a physical or mental impairment that subsequently limits one or more of the major life activities; or (2) is regarded as having such an impairment, or (3) has a record of such impairment.¹⁶⁸ In the context of the ADA, the term "disabled" does not include individuals solely because the individual is a transvestite, homosexual or bisexual; additional conditions not included are transsexualism, pedophilia, exhibitionism, voyeurism, gender disorder absent physical impairment, compulsive gambling, kleptomania.¹⁶⁹ Where use of controlled substances is the basis of any adverse treatment, the individual is not considered qualified for protection under the ADA.¹⁷⁰

The ADA requires that the EEOC issue regulations to implement the provisions dealing with employment discrimination under Title I.¹⁷¹ The regulations provide clarification of the definition of disability by providing guidance for applying the specific terms of the statute including: (1) physical or mental impairment;¹⁷² (2) major life activities;¹⁷³ (3) substantially limits;¹⁷⁴ (4) has a record of such impairment;¹⁷⁵ and (5) is regarded as having such an impairment.¹⁷⁶

The regulations issued by the EEOC in 1991 provide guidance for applying the first prong of the definition of "a person with a disability" by stating that the

161. *See id.* §§ 12,111-12,117.

162. *See id.* §§ 12,131-12,165.

163. *See id.* §§ 12,181-12,189.

164. *See id.* §§ 225, 711.

165. *See* 47 U.S.C. § 225.

166. 42 U.S.C. § 12,102(2).

167. 29 U.S.C. § 706(8)(B), (C).

168. *See* 42 U.S.C. § 12,102(2).

169. *See id.* §§ 12,114, 12,208, 12,211.

170. *See id.* §§ 12,114, 12,210.

171. *See id.* § 12,116.

172. *See* 29 C.F.R. § 1630.2(h) (1999).

173. *See id.* § 1630.2(i).

174. *See id.* § 1630.2(j).

175. *See id.* § 1630.2(k).

176. *See id.* § 1630.2(l).

term "physical impairment" included: (1) any physical disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or (2) any mental or psychological disorder, such as mental retardation, organic-brain syndrome, emotional or mental illness, and specific hearing disabilities.¹⁷⁷ The EEOC regulations further provided that whether a person is impaired is to be determined without mitigating measures such as medicines, or assistive or prosthetic devices.¹⁷⁸ The example given is that of an epileptic who is to be regarded as having an impairment even if the symptoms of epilepsy can be controlled by drugs.¹⁷⁹ Similarly, a person with a hearing or vision loss is to be regarded as impaired even if the condition can be corrected with a hearing aid or glasses.¹⁸⁰

According to the EEOC regulations, major life activities include: "Caring for oneself, performing manual tasks, seeing, hearing, speaking, breathing, learning, or working."¹⁸¹ The regulations specifically indicate that the provided list is not to be regarded as exhaustive noting that other major life activities "include, but are not limited to, sitting, standing, lifting and reaching."¹⁸² The EEOC Interpretative Guidelines include within the terms of major life activities "those basic activities that the average person in the general population can perform with little or no difficulty."¹⁸³

The EEOC set out factors to be considered in determining whether an individual is substantially limited in a major activity including: "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact, resulting from the impairment."¹⁸⁴ The term "substantially limits" is given the meaning: "(i) unable to perform a major life activity that the average person of the general population can perform; or (ii) significantly restricted as to the condition, manner or duration under which . . . the average person in the general population can perform that same major life activity."¹⁸⁵ The EEOC guidelines indicate that for a disability to exist an impairment must substantially limit one or more of an individual's major life

177. See *id.* § 1630.2(h).

178. See 29 C.F.R. app. § 1630.2(h). *But see* the recent Supreme Court cases holding that mitigating measures are taken into account in determining disability; *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

179. See *id.*

180. See *id.*

181. *Id.* § 1630.2(i).

182. *Id.*

183. 29 C.F.R. § 1630.2(i).

184. *Id.* § 1630.2(j)(2).

185. *Id.* § 1630.2(j)(l).

activities.¹⁸⁶

Under the second prong of the ADA's definition of disabled, an individual with a record of such impairment "is someone who (1) had a physiological or mental disorder but no longer has that impairment" (e.g., an individual who in the past was misclassified as having a learning disorder.)¹⁸⁷ The EEOC interpretation of this prong of the disability definition requires that the record of impairment must show that it would substantially limit one or more of the individual's major life activities.¹⁸⁸ Further, the individual's record of impairment must be of a condition that would be covered under the ADA if it were a current condition.¹⁸⁹ The EEOC's interpretation of the ADA takes the view that the mere fact an individual has a record of being a "disabled veteran," or is on "disability retirement," or is classified as disabled for other purposes does not mean that the individual necessarily satisfies the ADA definition of disability.¹⁹⁰

Under the third prong of the ADA's definition of disability, an individual who "is regarded as having such an impairment"¹⁹¹ can fit into one of three different categories according to the EEOC regulations.¹⁹² The first category includes individuals with a physical or mental impairment that does not substantially limit a major life activity, but whose impairment is treated as though it does.¹⁹³ The EEOC offers the example of an individual with controlled high blood pressure that is not, in fact, substantially limiting, but who is reassigned to less strenuous work because of the employer's unsubstantiated fears.¹⁹⁴ The second category includes individuals with a physical or mental impairment that substantially limits a major life activity only as a result of the prejudice of others toward the impairment.¹⁹⁵ An example of one such impairment is physical disfigurement.¹⁹⁶ Finally, individuals may fit into the third category which includes persons who do not have a physical or mental impairment but who are treated as though they do.¹⁹⁷ This category includes the male homosexual who is assumed to be HIV infected merely by virtue of his sexual orientation.¹⁹⁸

Neither AIDS nor the HIV infection is directly identified within the statutory language of the ADA. Of course, this is to be expected because the ADA does

186. *See id.* § 1630.2(i).

187. 29 C.F.R. app. § 1630.2(k); 56 Fed. Reg. 35,742.

188. *See* 29 C.F.R. app. § 1630.2(i)-(j); 56 Fed. Reg. 35,741.

189. *See* 29 C.F.R. app. § 1630.2(i)-(j); 56 Fed. Reg. 35,741.

190. 29 C.F.R. app. § 1630.2(k); 56 Fed. Reg. 35,742.

191. 42 U.S.C. § 12,202(2)(c) (1994).

192. *See* 29 C.F.R. app. § 1630.2(1); 56 Fed. Reg. 35,742.

193. *See* 29 C.F.R. app. § 1630.2(i) (construing 42 U.S.C. § 12,102(2)(A)-(C)).

194. *See id.*

195. *See id.*

196. *See id.* (construing 42 U.S.C. § 12,102(2)(b)).

197. *See id.* (construing 42 U.S.C. § 12,102(2)(6)).

198. *See id.*

not make mention of any specific disease; but instead, defines the concept of disability with reference to impairment and substantial limitation on major life functions. However, the legislative history is clear that it was the intention of members of the House and Senate that these medical conditions be treated as disabilities.

The first legislation introduced to provide protection from discrimination of individuals having AIDS or HIV infection was the AIDS Federal Policy Act of 1987¹⁹⁹ that would have amended the Public Health Services Act. This legislation would have provided non-discrimination protection in employment, housing, and public services to those persons who were infected, or who were regarded as infected, with the causal agent for Acquired Immune Deficiency Syndrome.²⁰⁰ This legislation made no distinction between symptomatic and asymptomatic infection. Both the Senate and House's versions of their legislation addressed the issue of "otherwise qualified" by providing that an individual would not otherwise be qualified if under established medical criteria, under the circumstances involved, an infected individual would expose other individuals to a significant possibility of being infected.²⁰¹ Hearings were held in 1988 on this legislation in both the House²⁰² and Senate,²⁰³ but no further action was taken.

Legislation was introduced in 1988 in the form of an initial Americans with Disabilities Act, abandoning the approach of an HIV-specific statute and introducing a more generalized approach to antidiscrimination protection for persons with disabilities without identifying specifically individual diseases or disorders covered such as AIDS or HIV infection.²⁰⁴ Joint hearings were held, but the legislation did not proceed for further action.²⁰⁵

In 1989, when the 101st Congress convened, the Americans with Disabilities

199. S. 1575, H.R. 3071, 100th Cong. 1st Sess. (1987), 133 CONG. REC. 21,903 (1987).

200. See S. 1575, H.R. 3071 § 2341.

201. S. 1575, H.R. 3071 § 2341(b)(1).

202. See *Bills and Resolution to Improve AIDS Counseling and Education, and to Encourage Better Testing and Reporting to Help Protect the General Public Against AIDS Infection: Hearings on H.R. 338, H.R. 339, H.R. 344, H.R. 345, H.R. 2272, H.R. 2273, H.R. 3071, and H.R. Con. Res. 8 Before Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. (1988).

203. See *To Amend the Public Health Services Act to Establish a Grant Program to Provide for Counseling and Testing Services Related to Acquired Immune Deficiency Syndrome and to Establish Certain Prohibitions for the Purpose of Protecting Individuals with Acquired Immune Deficiency Syndrome and to Establish Certain Prohibitions for the Purpose of Protecting Individuals with Acquired Immune Deficiency Syndrome or Related Conditions: Hearings on S. 1575 Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. (1988).

204. See S. 2345, H.R. 4498, 100th Cong., 2nd Sess. (1988).

205. See *Joint Hearing of the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong., 2nd Sess. (1988).

Act was introduced.²⁰⁶ The Senate version of the ADA was referred to the Committee on Labor and Human Resources whose report clearly includes the conclusion that HIV infection, both symptomatic and asymptomatic, is to be treated as a disability under the ADA.²⁰⁷ The House version of the ADA was referred to four committees, two of which (the Committee on Labor and Education²⁰⁸ and the Committee on the Judiciary²⁰⁹) specifically concluded that HIV infection, whether symptomatic or asymptomatic, qualified as a disability under the ADA. While all of the Congressional legislative reports on the ADA that considered the question of whether HIV infection is a disability under the ADA reached the same conclusion that it is, however, none of the reports actually proceeded through a step-by-step analysis under the actual terms of the statute to show how AIDS and HIV-infection met the statutory criteria for disability. Instead, these reports simply assume that the impairment caused by HIV is a significant physical impairment and that persons with HIV infection are assumed to have a disability. Nevertheless, both the House and Senate reports make it clear that in enacting the ADA, both houses of Congress concurred in the view that "discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and that Nation's efforts to control the epidemic."²¹⁰ In response to this assessment, the reports of the Senate and the House make it equally clear that it was the intent of the sponsors of the ADA that the AIDS and HIV-infection be recognized as disabilities under the terms of the ADA.²¹¹ For example, the House Report specifically endorsed the view that "a person infected with human immunodeficiency virus is covered under the first prong of the definition of the term disability because of a substantial limitation to procreation and intimate sexual relations."²¹²

The various Congressional committees were much less focused on whether AIDS and HIV-infection constitute a disability than they were with whether HIV, as an infectious disease, should be treated differently than other disabilities. One of the most hotly debated issues concerned coverage of HIV-infected persons employed in food handling jobs. A proposed amendment to section 103 of the House Bill by Representative Chapman would have permitted an employer to refuse to assign, or to reassign, an employee with an infectious or communicable

206. See S. Res. 933, 101st Cong., 1st Sess. (1989); H.R. Res. 2273, 101st Cong., 1st Sess. (1989).

207. See Senate Comm. on Labor and Human Resources, *Americans with Disabilities Act of 1989*, S. REP. NO. 116, at 8 (1989).

208. See H.R. REP. NO. 101-485, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

209. See H.R. REP. NO. 101-485, at 28, *reprinted in* 1990 U.S.C.C.A.N. 445, 451.

210. H.R. REP. NO. 101-485, at 31 (1990); S. REP. NO. 101-116, at 8 (citing statement of the Chairman of the President's Commission on the Human Immunodeficiency Virus Epidemic, Admiral James Watson).

211. See S. REP. NO. 101-116, at 22 (1990), H.R. REP. NO. 101-485, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333.

212. H.R. REP. NO. 101-485, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 305, 333.

disease to a job involving food handling, provided the employer provided the worker alternative employment.²¹³ Congressman Chapman conceded that the Centers for Disease Control had reported that there was no evidence of any case of HIV being transmitted in the process of handling food, but the Congressman maintained that the fact there were reported cases of HIV infection when the cause of infection was unknown provided sufficient justification for the right to discriminate against HIV-infected food handlers.²¹⁴ In order to reach a compromise between the Senate version of the ADA and the House version with the Chapman amendment, an amendment by Senator Hatch was adopted that required the Secretary of Health and Human Services, not later than six months after passage of the ADA, to determine if there were any infections or communicable diseases that might be transmitted through food handling.²¹⁵ Such a list, if provided, would serve as a basis for an exception to the prohibition of employment discrimination against disabled persons.²¹⁶ The Secretary of Health and Human Services and the United States Public Health Service were already on record with the view that HIV is not transmitted through food preparation services, and no exception was made for food handlers with AIDS or HIV infection.²¹⁷

The EEOC is responsible for enforcing the employment non-discriminations disability provisions of Title I of the ADA.²¹⁸ The Department of Justice (DOJ) is responsible for promulgating regulations and guidelines for enforcement of nondiscrimination against the disabled in public services under provisions of Title II of the ADA,²¹⁹ and in public accommodations under provisions of Title III of the ADA.²²⁰ The DOJ regulations follow those of the EEOC in adopting the definition of the term "physical or mental impairment" in the regulations implementing section 504 of the Rehabilitation Act of 1973.²²¹ However, the DOJ regulations go further by adopting an additional support of the definition of "physical or mental impairment" that lists specific conditions and diseases. The DOJ regulations provide:

The phrase physical or mental impairment includes, but is not limited to, such contagious and noncontagious diseases and conditions as

213. See 136 CONG. REC. 10,911 (1990).

214. See *id.* at 10,911-12.

215. See 136 CONG. REC. S9555-6 (daily ed. July 11, 1990).

216. See *id.*

217. See Letter to Louis W. Sullivan, Secretary of Health and Human Services, 136 CONG. REC. S9545 (daily ed. July 11, 1990); CDC, *Summary: Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy Associated Virus in the Workplace*, 34 MMWR 681, 693-94 (1985), in 136 CONG. REC. S9546 (daily ed. July 11, 1990).

218. See 42 U.S.C. § 12,116 (1994).

219. See *id.* § 12,134(a).

220. See *id.* § 12,186(b).

221. 34 C.F.R. § 104 (1999).

orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.²²²

The DOJ regulations clearly state that HIV infection constitutes an impairment: "HIV disease (whether symptomatic or asymptomatic constitutes a physical impairment."²²³

VI. PRE-BRAGDON V. ABBOTT CASE LAW FINDING PERSONS WITH AIDS AND HIV-INFECTION PROTECTED UNDER ADA

A. AIDS Diagnosis and HIV-Infection Treated as a Presumed Disability

Many of the federal courts considering discrimination claims based on AIDS or HIV-infection brought under the ADA have not undertaken an extensive analysis to determine whether either, or both, conditions qualify as disabilities under the statute. In some cases, the court has merely adopted the proposition that these conditions constitute a disability without further analysis. For example, in *Howe v. Hull*,²²⁴ a patient's estate sued a hospital and admitting physician for refusal to admit a patient with HIV infection in a federal district court in Ohio. Although hospital physicians differed on whether the patient had progressed to full-blown AIDS or was merely HIV-positive, the federal district court found no need to reach a conclusion on this matter. Without further analysis, the court concluded: "A disability is defined [in the ADA] as 'physical or mental impairment that substantially limits the person in one or more major life activities.' AIDS and HIV infection are both disabilities within the meaning of the ADA."²²⁵

Some courts have concluded that AIDS and HIV infection constitute disabilities by reference to other courts' opinions construing the Rehabilitation Act of 1973.²²⁶ These courts have simply cited regulations issued by the relevant agency designated by the ADA which provide guidance for applying the statutory terms such as "disability."²²⁷

222. 28 C.F.R. § 36.104.

223. *Id.*

224. 873 F. Supp. 72 (N.D. Ohio 1994).

225. *Id.* at 78 (citing 42 U.S.C. § 12,102(2)(A); *T.E.P. v. Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993); 28 C.F.R. § 36,104(i)(b)(ii)).

226. *See, e.g., Robinson v. Henry Ford Health Sys.*, 892 F. Supp. 176, 180 (E.D. Mich. 1994).

227. *D.B. v. Bloom*, D.D.S., 896 F. Supp. 166, 170 n.4 (D.N.J. 1995).

B. AIDS Diagnosis and HIV Infection Treated as a Per Se Disability

In *Anderson v. Gus Maker Boston Store*,²²⁸ a federal district court in Texas found AIDS and asymptomatic HIV-infection to be per se disabilities under the ADA. The court began its analysis by citing, as the standard for determination of the existence of a disability, the three-pronged definition of disability in the ADA.²²⁹ The court next noted that the ADA defines disability in substantially the same terms that the Rehabilitation Act of 1973 defines handicaps.²³⁰ Moreover, the ADA was enacted, according to the court, with the expectation that the Rehabilitation Act, and the case law construing it, would be used in interpreting the ADA.²³¹

The court in *Anderson* recognized that a disability under the ADA necessarily involves an impairment that has the impact of substantially limiting one or more major activities of the individual. But significantly, the court found that the EEOC regulations promulgated pursuant to the ADA are to be given significant deference when determining the meaning of the ADA.²³² The court observed that although the list of major life activities in the EEOC regulations is not exhaustive, the list does include such functions as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."²³³ Without citation the court concluded that "impairments on the procreative process also substantially limit a major life activity."²³⁴

The *Anderson* court then recognized a second basis of authority for its conclusion that AIDS and asymptomatic-HIV infection are per se disabilities under the ADA. The court was very direct in its view that a case-by-case analysis is not required because a body of case law has determined that both AIDS and HIV infection constitute disabilities due to the substantial limitations these conditions place on a person with AIDS or HIV infection in their ability to procreate or engage in sexual relationships.²³⁵ The *Anderson* court declared: "Conditions such as AIDS, HIV, blindness and deafness, inter alia, have been determined by the courts to be per se disabilities. In other words, it has been established both that these conditions impact a major life activity and that this impact is substantially impairing of a given activity."²³⁶ The courts reading of both the EEOC regulations and the case law provides its authority for the

228. 924 F. Supp. 763 (E.D. Tex. 1996).

229. *See id.* at 773 (citing 42 U.S.C. § 12,102(2)).

230. *See id.* (citing *Dutcher v. Ingalls Shipbuilders*, 53 F.3d 723, 725 n.4 (5th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993)).

231. *See id.* (citing *Collings v. Longview Fibre Co.*, 63 F.2d 828 (9th Cir. 1995); *Bolton v. Scrivner, Inc.* 36 F.3d 939 (10th Cir. 1994); 29 C.F.R. § 1630, app. Part 1630—Interpretation Guidelines to Title I of the ADA, § 1630.2(g) (1995)).

232. *See id.* at 773-74 n.19.

233. *Id.* at 773 (citing *Dutcher*, 53 F.3d at 726).

234. *Id.* at 774 (citing 29 C.F.R. § 1630.2(i)).

235. *See id.*

236. *Id.* at 774-75 (citations omitted).

conclusion that AIDS and HIV infection are per se disabilities.

The *Anderson* court, however, provided an alternative basis for finding disabilities when applying the three-pronged definition of disability provided in the ADA.²³⁷ The court goes on to conclude that when a condition has not been recognized as a per se disability, the court should treat the question of whether a given condition is a disability as a mixed question of law and fact.²³⁸ The court went on to conclude that if HIV is not a per se disability (as the court believes it to be), then the court finds that Anderson's HIV-status in this case was a disability as a matter of law.²³⁹ To support its conclusion, the court cited the relevant EEOC regulations and noted that restrictions on procreation and travel are experienced by persons with HIV-infection.²⁴⁰ The court notes in a footnote: "Beyond the obvious impairment on the ability to procreate, even an asymptomatic HIV-positive individual cannot travel freely. Such an individual must be always mindful of exposure to bacterial infection and fungi or even places requiring vaccinations."²⁴¹

*C. AIDS Diagnosis and HIV-Infection Treated as a Disability
Because of Physical Impairment*

Doe v. Kohn, Nast & Graph, P.C.,²⁴² decided by a federal district court in Pennsylvania, involved an HIV-infected attorney claiming that his discharge by a law firm violated the ADA. A significant issue in the case was whether HIV-infection constituted a disability within the meaning of the ADA. The court characterized the law firm's defense in these terms: "The thrust of the defense argument is that even though HIV-positive status, most assuredly, is not a happy medical condition with which to be diagnosed, it is not in fact disabling."²⁴³ Basically, the defense maintained that HIV infection was not an impairment and that the HIV infection did not interfere with any major life function of the plaintiff; most importantly, it did not prevent him from engaging in legal work.²⁴⁴

The federal district court began its analysis by citing the three-pronged definition of disability in the ADA.²⁴⁵ However, the court quickly noted that the plain language of the statute does not provide any significant guidance for determining whether HIV-infection is within the meaning of disability.²⁴⁶ Moreover, the trial court judge eschewed any notion that the everyday understanding of disability was controlling. The court noted

237. *See id.*

238. *See id.* at 775 (citing 42 U.S.C. § 12,102(2) (1994)).

239. *See id.* at 776.

240. *See id.* at 777.

241. *Id.* at 777 n.37.

242. 862 F. Supp. 1310 (E.D. Pa. 1994).

243. *Id.* at 1318.

244. *See id.*

245. *See id.* at 1318-19.

246. *See id.* at 1319 (citing 42 U.S.C. § 12,102(2) (1994)).

[t]hat lay observation may have a certain common sense ring to it, but my role is not limited to construe the statute so that it might conform with a lay perception. Rather, I must read with care the definition of disability that Congress and the EEOC, gave us, and decide whether this plaintiff's disease and its symptoms fall within one or more of those express statutory and regulatory definitions, as anomalous as the statutory result might seem to some.²⁴⁷

Drawing upon the first prong of the ADA and the relevant EEOC regulations, the court concluded that the HIV-infected attorney was disabled.²⁴⁸

The court found that the HIV infection resulted in an impairment to the extent that it produced certain psychological disorders including fever, rash, and skin disorders.²⁴⁹ Further, the court found the existence of impairment from the fact that HIV creates a physiological disorder of the hemic (blood) and lymphatic symptoms, citing a usual development of swollen lymph nodes created by HIV infection.²⁵⁰

In considering the issue of limitations on major life activities, the court considered the relevant EEOC regulations.²⁵¹ However, the court found no basis in the regulations for the claim that the relevant life activity under the statute were limited to work-life or work-activities.²⁵² While the plaintiff argued that HIV infection limited his ability to procreate, the court did not base its conclusion that the plaintiff was disabled on that basis. According to the court:

The factual record in this case is thin, indeed, as to whether HIV status is a disorder or condition that affects the "reproduction" system. No physicians testified as to that, and the parties seemed content to rely on administrative findings and the ruling of other judges . . . [such as] a case involving a plaintiff with full-blown AIDS . . . found in dictum that a person who is HIV-infected is substantially limited in a major life activity because of the significant risk of transmitting the HIV infection to a partner or a child, thereby endangering their lives.²⁵³

The court, nonetheless, specifically stated that, "[i]t is clear, therefore, that the language of the statute does not preclude procreating as a major life activity, but many will include it."²⁵⁴ Thus, the court suggested procreation could constitute a major life activity, but such a showing was not necessary to establish

247. *Id.*

248. *See id.* at 1319-20.

249. *See id.* at 1320 (construing 42 U.S.C. § 12,102(2); 29 C.F.R. § 1630.2(h) (1993)).

250. *See id.* (citing depositions of physicians who had treated the plaintiff).

251. *See id.* (citing *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) (citing *Doe v. Dolton Elementary Sch. Dist.*, No. 148, 694 F. Supp. 440 (N.D. Ill. 1988) (describing in detail the effects of HIV infection on the body))).

252. *See id.* (citing 29 C.F.R. § 1630.2(i)).

253. *Id.*

254. *Id.*

that HIV-infection resulted in disability.²⁵⁵ The court based its finding of disability on the physiological effects of HIV infection. The court concluded that the effect of the plaintiff's infection resulted in physical impairment that substantially limited one or more of the plaintiff's major life functions, and, therefore, he had a disability within the meaning of the ADA.²⁵⁶ The court in *Doe v. Kohn Nast & Graf, P.C.*, based its conclusion on a two factor analysis: (1) HIV infection constituted an impairment, and (2) this impairment produced physical symptoms, or interference with physiological functions, in the form of fever, rash, weight loss, skin disorders, and swollen lymph nodes.²⁵⁷

The court went on to determine that the plaintiff did not satisfy the second prong of the definition of disability in the ADA, determining that the plaintiff neither had a record of such impairment, nor was he likely to establish that he was discriminated against because others regarded him as having such an impairment.²⁵⁸ The court found the plaintiff did not have a record of such impairment because he was discharged only a few months after he tested HIV-positive. The court reasoned that this period of time was not long enough to constitute a history of impairment.²⁵⁹ The court also suggested that the plaintiff was not likely to establish that members of the law firm perceived him to be impaired because there was a litany of legitimate reasons why plaintiff was fired.²⁶⁰

D. HIV-Infection Treated as Disability Because of Infectiousness

Gates v. Rowland,²⁶¹ decided in 1994 by the Ninth Circuit involved claims of discrimination within a correctional facility. The opinion of the court is significant for two reasons. First, the court did not draw a distinction between AIDS and HIV-infection, and second, because it found a disability to exist because of the "infectiousness" of HIV. The case was brought under the Rehabilitation Act of 1973,²⁶² but the court significantly cited the Americans with Disabilities Act and the Department of Justice Regulations promulgated under authority of that statute.²⁶³

The court's analysis began with consideration of the Supreme Court's opinion in *School Board of Nassau County v. Arline*.²⁶⁴ The court noted that according to the *Arline* opinion, the contagious effects of a disease cannot be

255. See *id.* at 1321.

256. See *id.* at 1320.

257. See *id.* at 1321.

258. See *id.*

259. See *id.* at 1322 (applying 29 C.F.R. § 1620.2(l), (k) (1993)).

260. See *id.*

261. 39 F.3d 1439 (9th Cir. 1994).

262. See *id.* at 1445 (citing 29 U.S.C. § 794(a) (1994)).

263. See *id.* at 1446 (citing 42 U.S.C. § 12,101(2); 28 C.F.R. § 35,104(4)(l)(ii)).

264. 480 U.S. 273 (1987)).

distinguished from the physical effects of a disease.²⁶⁵ The court then cited its own opinion in *Chalk v. United States District Court* for the proposition that in determining the existence of handicap or disability, "the physical impairment to the individual is not the issue, but rather the issue is the contagious effect of the HIV virus."²⁶⁶ With regard to infectiousness, the court concluded that there is no distinction to be made between persons with an AIDS diagnosis and those who are asymptomatic. The court noted that the ADA defines disability in virtually identical terms to the Rehabilitation Act of 1973.²⁶⁷ The court further observed that the DOJ regulations implementing the ADA include in their catalogue of physical or medical impairments "HIV disease whether symptomatic or asymptomatic."²⁶⁸ On this basis, the court stated: "[W]e hold that a person infected with the HIV virus is an individual with a disability within the meaning of the Act."²⁶⁹

VII. CASE LAW FINDING PERSONS WITH HIV-INFECTION NOT PROTECTED UNDER THE ADA

A. A Particularized Determination That Asymptomatic HIV Infection Is Not a Disability

Ennis v. National Ass'n of Business and Educational Radio Inc., decided by the United States Court of Appeals for the Fourth Circuit in 1995, involved an employee who claimed she was fired because her employer wanted to avoid paying for medical insurance for her adopted son who was HIV-infected but asymptomatic.²⁷⁰ The basis of this action was not a claim of prohibited discrimination of a "qualified individual with a disability" under the ADA. Instead, the suit was brought under a section of the ADA that prohibits employers from making adverse employment decisions against an employee "because of the known disability of a person with whom the qualified individual is known to have an association."²⁷¹

The court in *Ennis* undertook an analysis of whether the HIV-infected child met any of the three prongs of the definition of disability set out in the ADA

265. See *Gates*, 39 F.3d at 1446 (citing *Arline*, 480 U.S. at 273).

266. *Id.* (construing *Chalk v. United States Dist. Court*, 840 F.2d 701 (9th Cir. 1988)).

267. See *id.* (comparing 42 U.S.C. § 12,101(2) (1994) and 29 U.S.C. § 706(8)(B) (1994)).

268. *Id.* (citing 28 C.F.R. § 35.104(4)(i)(ii) (1993)).

269. *Id.* See also *Harris v. Thigpen*, 941 F.2d 1495, 1524 (11th Cir. 1991).

Whether or not asymptomatic HIV infection alone is defined as an actual "physical impairment," it is clear that this correctional system *treats* the inmates such that they are unable or perceived as unable, to engage in "major life activities" relative to the rest of the prison population . . . we believe that it is appropriate in this case to find seropositivity a "handicap" with the meaning of the Act.

Id.

270. *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55 (4th Cir. 1995).

271. *Id.* at 57 (citing 42 U.S.C. § 12,112(b)(4)).

definition.²⁷² The court expressed skepticism about the authority of the EEOC regulations defining "impairment,"²⁷³ rejected the notion that the ADA permitted recognition of any per se disability,²⁷⁴ and stressed the need for a case specific finding of both an impairment and an actual limitation of a major life activity of the individual.²⁷⁵

According to the *Ennis* court, "the plain language of the [ADA's disability] provision requires that a finding of disability be made on an individual basis."²⁷⁶ The court reasoned that the terms of the definition of disability anticipated a particularized determination.²⁷⁷ Specifically, the court cited the terms of the statutory definition of disability that requires a finding of impairment "with respect to [the] individual," and the court stressed the requirement that the finding of an impairment must involve the determination that the impairment, "substantially limit[s] a major life activity of the individual."²⁷⁸ Further, the court cited a number of federal court opinions including one of its own opinions, construing the Rehabilitation Act of 1973, that concluded "the question of who is a handicapped person under the Act is best suited to a 'case-by-case determination.'"²⁷⁹

The court went on to consider the factual evidence before it and concluded that there was no evidence in the record to support the view that the child in question was "impaired, to any degree, or that he currently endures any limitation, . . . on any major life activity."²⁸⁰ The court did not explore the medical understanding of asymptomatic HIV infection, but simply assumed that a finding of disability required a finding of visible physical manifestations of the effects of HIV infection. The court found no such observable physical manifestations citing the mother's admission that "her son suffers no ailments or conditions that affect the manner in which he lives on a daily basis."²⁸¹

The court in *Ennis* adopted the view that the only way asymptomatic HIV-infection could be found to be a disability would be to regard all HIV-infected persons as disabled. According to the court, in order to find the child "disabled under the ADA, therefore, we would have to conclude that HIV-positive status

272. *See id.* at 59 (citing 42 U.S.C. § 12,102(2)).

273. *Id.* at 60-61 n.4 (discussing 29 C.F.R. § 1630.2(h)(1) (1994) and concluding that "[a]lthough uncertain of the EEOC's authority to promulgate this regulation . . . we do not understand this regulation to be in conflict with the above conclusion.").

274. *See id.*

275. *See id.* at 59-60.

276. *Id.* at 59.

277. *See id.*

278. *Id.*

279. *Id.* at 60 (quoting *Forrissi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); citing *Chandler v. City of Dallas*, 2 F.3d 1385, 1396 (5th Cir. 1993); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1417 (10th Cir. 1992); *Byrne v. Board of Educ.*, 979 F.2d 560, 564-64 (7th Cir. 1992); *United States v. Southern Management Corp.*, 955 F.2d 914-18 (4th Cir. 1992)).

280. *Id.*

281. *Id.*

is per se a disability."²⁸² Instead, the *Ennis* court took the view that

[t]he plain language of the statute, which contemplates case-by-case determinations of whether a given impairment substantially limits a major activity, whether an individual has record of such a substantially limiting impairment, or whether an individual is being perceived as having such a substantially limiting impairment, simply would not permit this a [sic] conclusion.²⁸³

Ultimately the court concluded that the facts as presented did not support the view that Ennis was discriminated against on the basis of her child's HIV-infection.²⁸⁴

*B. Asymptomatic HIV Is "Per Se" Not a Disability Under ADA:
Runnebaum v. NationsBank of Maryland*

The *Runnebaum* opinions delivered by the Fourth Circuit represent the most restrictive view of the application of the disability provisions of the ADA to HIV-infected persons or, more particularly, to asymptomatic HIV-infected persons.²⁸⁵ The final plurality en banc opinion rendered in the series of *Runnebaum* opinions can be characterized as amounting to a view that asymptomatic HIV-infection is per se not a disability under the terms of ADA.²⁸⁶ Although the decision of the United States Supreme Court in *Bragdon v. Abbott*²⁸⁷ effectively negates the significance of much of the approach taken by the Fourth Circuit in *Runnebaum II*, the possibility after the *Abbott* opinion remaining of individualized determination of disability under the ADA suggests the value of a close examination of the *Runnebaum* opinions. Part of the value of the *Runnebaum* opinion is the opportunity it affords to observe the approach to statutory analysis taken by the en banc plurality opinion in which limited its analysis to the facial language of the statute eschewing the legislative history and agency regulations that have played an important role in the opinions of other courts, including the opinion of the United States Supreme Court in *Bragdon v. Abbott*.²⁸⁸

William Runnebaum, diagnosed as having asymptomatic HIV-infection, claimed discrimination was the basis of the termination of his employment by

282. *Id.*

283. *Id.*

284. *See id.* at 62.

285. *Runnebaum v. NationsBank of Md.*, 95 F.3d 1285 (4th Cir. 1996), *aff'd*, 123 F.3d 156 (4th Cir. 1997) (en banc) ("Runnebaum II").

286. *See Runnebaum II*, 123 F.3d at 176 (Michael, J., dissenting). The dissent observes: "I believe the majority means to create a *per se* rule excluding those with asymptomatic HIV from the protections of the ADA." However, the majority's responds "[t]he dissent would, perhaps, have us hold that asymptomatic HIV infection is per se not a disability under the statute. As we discuss below, however, we decline to do so." *Id.* at 167.

287. 524 U.S. 624 (1998).

288. *Compare Runnebaum II*, 123 F.3d at 169 n.7, with *Bragdon*, 524 U.S. at 624.

NationsBank of Maryland in violation of the ADA²⁸⁹ and the Employment Retirement Income Security Act (ERISA).²⁹⁰ To prevail on an ERISA claim, it was necessary for Runnebaum to establish the elements required by the ADA.²⁹¹ The federal district court, without issuing an opinion, granted the Bank's motion for summary judgment on the ground that Runnebaum failed to establish a prima facie case under the ADA.²⁹² A divided, three-judge panel of the Fourth Circuit reversed the district court's grant of summary judgment, holding that Runnebaum had established a prima facie case of discrimination based on disability and had raised issues of material fact as to whether he was fired because he was regarded as having a disability.²⁹³

The opinion rendered by the three-judge panel ("*Runnebaum I*") began its analysis by referring to the elements of discriminatory discharge set forth in the ADA, including the requirement that a plaintiff establish that he comes within the class of qualified persons for protection due to his disability.²⁹⁴ Further, the court discussed the three prong definition of disability under the ADA²⁹⁵ and the relevant EEOC regulations.²⁹⁶ In addition, the court cited to judicial authority²⁹⁷ and relevant regulations of various federal agencies²⁹⁸ for the proposition that asymptomatic HIV-infection is a disability per se. Nevertheless, the court found the Fourth Circuit opinion in *Ennis v. National Ass'n of Business and Educational Radio* binding and required an individualized inquiry for a finding of disability under any of the three prongs of the ADA test.²⁹⁹

The majority of the three-judge panel concluded that Runnebaum presented

289. 42 U.S.C. §§ 12,101-12,213 (1994 & Supp. III 1997).

290. 29 U.S.C. §§ 1001-1461 (1994 & Supp. 1997).

291. See *Runnebaum II*, 123 F.3d at 175 (citing *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 239 (4th Cir. 1991)).

292. See *Runnebaum v. NationsBank of Md.*, 95 F.3d 1285, 1287 (4th Cir. 1996), *aff'd*, 123 F.3d at 156.

293. See *id.* at 1296.

294. See *id.* at 1289 (citing Title I of the ADA, 42 U.S.C. § 12,112 (1994)).

295. See *id.* (citing 42 U.S.C. § 12,102(2)).

296. See *id.* (citing 29 C.F.R. § 1630.2(a)(2) (1994)).

297. See *id.* at 1289-90 (citing *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Abbott v. Bragdon*, 912 F. Supp. 580, 585-86 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *and rev'd in part*, 524 U.S. 624 (1998); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1321 (E.D. Pa. 1994); *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120, 132 (N.D.N.Y. 1992); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990); *Benjamin R. v. Orkin Exterminating Co.*, 390 S.E.2d 814, 818 (W. Va. 1990)).

298. See *id.* at 1289 (citing 29 C.F.R. § 34.2 (Department of Labor); 28 C.F.R. § 35.104 (Department of Justice); 24 C.F.R. ch. 1, Subch. A., app. I (Department of Housing and Urban Development); 7 C.F.R. § 15e.103 (Department of Agriculture); 5 C.F.R. § 1636.103 (Federal Retirement Thrift Investment Board); 22 C.F.R. § 1701.103 (Institute of Peace); 45 C.F.R. § 2301.103 (Arctic Research Commission)).

299. See *id.* at 1290 (citing *Ennis v. National Ass'n of Bus. & Educ. Radio*, 53 F.3d 55, 59-60 (4th Cir. 1995)).

enough circumstantial evidence to establish a prima facie showing that he was terminated because he was regarded as having a disability³⁰⁰ and that he was performing his job at an adequate level.³⁰¹ The court did not find it necessary to make specific findings regarding the effects of HIV-infection in relation to the terms "impairment" and "major life activity." Rather, the court found the evidence established that: (1) bank employees knew Runnebaum was HIV-positive [Runnebaum had reported his sero-positivity to a bank supervisor]; (2) bank employees knew Runnebaum was taking AZT to treat his condition because packages of his medication had been delivered to the bank and opened by bank employees; and (3) the bank supervisor to whom Runnebaum had disclosed his HIV infection reported that he felt "panicky" and "uncontrolled" and believed death might be imminent for Runnebaum upon being informed of his condition.³⁰² The court concluded that this was enough to meet the evidentiary requirements that the bank perceived Runnebaum as having an impairment that substantially limited a major life activity.³⁰³ The court dismissed the argument that Runnebaum's claim was undermined by the fact that he checked a box on an employment form indicating that he was not handicapped at the time he applied for the job in the Bank's trust department.³⁰⁴ Instead, the court stressed that "the attitudes of others determine whether a person has a disability within the meaning" of the ADA.³⁰⁵

The court extensively discussed the reported reaction of the bank supervisor to Runnebaum's disclosure of his status as HIV-positive.³⁰⁶ The court noted that while there is a distinction between disabilities apparent to a casual observer ("[a]n employer can see a wheelchair, a guide dog, or a hearing aid") and those that are not visible to the naked eye, both types of disabilities are covered by the ADA.³⁰⁷ Moreover, the court noted, "[w]hen a disability is not readily apparent, an employer's reaction upon learning of the disability can be relevant to a finding of discrimination. Specifically, an employer's immediate reaction offers an insight into his later firing a disabled employee."³⁰⁸ The reaction of the supervisory bank employee, coupled with the fact that this employee reported his knowledge of Runnebaum's HIV infection to the individual who was ultimately responsible for terminating Runnebaum, satisfied the court that Runnebaum had presented sufficient evidence to raise a genuine issue of material fact as to

300. *See id.*

301. *See id.* at 1291.

302. *Id.* at 1296.

303. *See id.* at 1291.

304. *See id.* at 1290 n.2.

305. *Id.*

306. *See id.* at 1290.

307. *Id.* at 1295.

308. *Id.* at 1295 n.8 (citing *Lempres v. CBS Inc.*, 916 F. Supp. 15, 23 n.37 (D.D.C. 1996)

(Pregnancy Discrimination Act plaintiff must meet requirements similar to those of ADA plaintiffs. Pregnancy is not observable at first, yet an employer's reaction upon learning an employee is pregnant may provide basis for finding discriminatory discharge.)).

whether he was fired because he was regarded as having HIV disease.³⁰⁹

However, the dissenting opinion in *Runnebaum I* concluded that even if Runnebaum had established that he was an individual with a disability and had met the requirements for a prima facie case of discrimination under the ADA, the Bank had presented sufficient evidence to establish a legitimate, non-pretextual, non-discriminatory reason for his discharge.³¹⁰ Specifically, the dissent maintained Runnebaum failed to establish that he was meeting the Bank's legitimate expectations at the time of his discharge.³¹¹

Also, it is significant that the dissent did not find that Runnebaum met the three-prong definition of disability in the ADA.³¹² The dissent agreed with the majority that Runnebaum was required to establish the presence of an "impairment" affecting a "major life activity." However, the dissent maintained that the majority had provided no significant analysis of the facts in the case to support the conclusion that the terms of the statute were satisfied.³¹³ In a footnote, the dissent briefly addressed whether Runnebaum was disabled because he suffered an actual physical or mental impairment as a result of being HIV positive.³¹⁴ Because Runnebaum was asymptomatic for approximately four years prior to his termination, the dissent maintained he had neither suffered affliction from his HIV infection, nor experienced any significant side effects from the prescribed AZT medication.³¹⁵ The dissent concluded, without citation to the record, that: "Runnebaum has consistently maintained that he endures no impairment that substantially limits a major life activity, thereby proving that he is not disabled under the first prong of the ADA's definition of a disability."³¹⁶ The dissent then addressed the question of whether Runnebaum was "regarded as" disabled because of his asymptomatic HIV-infection.³¹⁷ The dissent maintained that Runnebaum's disclosure of his HIV-infection to a fellow bank employer was done in a social context in the form of a discussion between friends.³¹⁸ The reported feelings of "panic" were viewed by the dissent as the natural reaction of an associate of being "disheartened on learning that his friend was HIV-positive."³¹⁹ Moreover, the dissent concluded that the fellow employee "was solicitous of Runnebaum's health and sympathetic to Runnebaum's needs, with the fellow employee styling himself as Runnebaum's 'protector.'"³²⁰ Finally, the dissent observed that no showing was made to link knowledge of

309. *See id.* at 1297.

310. *See id.* at 1305 (Williams, J., dissenting).

311. *See id.* at 1303.

312. *See id.* at 1302 (finding that 42 U.S.C. § 12,102(2) (1994) does not apply).

313. *See id.*

314. *See id.* at 1303 n.5.

315. *See id.* (citing the trial record).

316. *Id.*

317. *Id.* at 1302.

318. *See id.* at 1302-03.

319. *Id.*

320. *Id.* at 1303.

Runnebaum's HIV status to the decision to discharge him; therefore, the dissent concluded that "Runnebaum failed to show that he was regarded as having a disability."³²¹

The Fourth Circuit vacated the opinion issued in the three-judge panel in *Runnebaum I* and granted an en banc rehearing.³²² The issues before the en banc court were somewhat altered as the result of an amicus brief to the Fourth Circuit filed by the legal department of Whitman-Walker Clinic ("WWC"), a community health center in Washington, D.C. specializing in services related to AIDS and HIV-infection, along with a brief filed by the EEOC. WWC's brief argued that a person with HIV-infection has an "impairment" under the terms of the ADA "because from the outset it [HIV] infects the blood and lymphatic system and progressively destroys the immune system."³²³ Similarly, the WWC brief maintained that all persons with HIV infection, whether symptomatic or asymptomatic, meet the definition of "disability" in the ADA because their viral infection substantially limits major life activities including parenting and pageantry, intimate personal relations, the ability to plan for the future, certain career options, access to health, life and disability insurance, and the ability to travel.³²⁴

The WWC brief provided an account of HIV infection and AIDS that portrays the disease progressing through various phases, rather than as a series of independent disease conditions.³²⁵ HIV infection is said to mark the start of disease progression which, within a month, is likely to be manifested in a short-term mononucleosis-like condition.³²⁶ Although antibodies can be detected in the blood within six months of infection, a person may not manifest any significant observable physical symptoms, the so-called "asymptomatic phase."³²⁷ However, the WWC brief pointed out that during this so-called asymptomatic phase, HIV is active in the hemic (blood) and lymphatic system and compromising the immune system ("progression of HIV disease is associated with characteristic immunopathic changes in lymphoid tissue").³²⁸ Medical treatment following a determination of HIV infection may include, among other interventions, dietary plans and medication including protease inhibitors to slow viral reproduction.³²⁹

321. *Id.*

322. *See Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (en banc).

323. Brief of Amicus Curiae, Whitman-Walker Clinic Legal Services at 3, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997) (en banc) (No. 94-2200) (supporting plaintiff/appellant on the issue of disability).

324. *Id.* at 4.

325. *See id.* at 5.

326. *See id.* (citing JOHN G. BARTLETT, *MEDICAL MANAGEMENT OF HIV INFECTION* 2-3 (1995)).

327. *Id.* (citing BARTLETT, *supra* note 326, at 3-4).

328. *Id.* at 6 (citing Oren J. Cohen et al., *Pathogenic Insights from Studies of Lymphoid Tissue from HIV-Infected Individuals*, 10 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES & HUMAN RETROVIROLOGY 56, 56-512 (Supp. I 1995)).

329. *See id.* at 7 (citing RONALD A. BAKER ET AL., *EARLY CARE FOR HIV DISEASE* 22-23

As physical symptoms develop, including opportunistic infections and disease, one is ultimately diagnosed with AIDS.³³⁰

The WWC brief also addressed the issue of whether HIV infection should be regarded as a per se disability.³³¹ Maintaining that the language of the ADA does not preclude HIV infection from being regarded as a disability, the WWC brief argues, "treating HIV disease as a per se disability is not inconsistent with the existence of impairment which substantially limits major life activities in every afflicted individual. For instance, blindness and deafness are impairments that inherently are substantially limiting."³³²

The en banc hearing in *Runnebaum II* resulted in a split opinion: six justices agreed that Runnebaum was not disabled and had failed to show he was fired because he was regarded as disabled;³³³ one justice concurred in the judgment that Runnebaum had failed to establish that he was fired because of a disability but maintained that the question of whether Runnebaum was disabled was not before the court;³³⁴ five justices dissented maintaining that Runnebaum had presented sufficient evidence of disability and discrimination to defeat summary judgment.³³⁵

In *Runnebaum II*, the majority of the en banc panel of the Fourth Circuit affirmed the district court's grant of summary judgment in favor of NationsBank, holding that Runnebaum had failed to establish a prima facie case of discrimination based on disability in violation of the ADA.³³⁶ The court held that Runnebaum's asymptomatic HIV-infection was not shown to have resulted in a disability; that Runnebaum had failed to show that his employer perceived him to be disabled; that Runnebaum had failed to raise a reasonable inference of unlawful discrimination; and, that Runnebaum's employer had articulated legitimate non-pretextual, non-discriminatory reasons for Runnebaum's discharge.³³⁷

To overcome the grant of summary judgment, the Fourth Circuit noted that Runnebaum was required to establish a prima facie case of discrimination under the ADA³³⁸ The majority in *Runnebaum II* recognized that to establish a prima facie case of discrimination in a discharge case under the ADA, the plaintiff is required to prove by a preponderance of the evidence that he was (1) a member

(1991); BARTLETT, *supra* note 326, at 61-63, 279-84; Marianna K. Baum et al., *Micro nutrients and HIV-1 Disease Progression*, 9 AIDS 1051-55 (1995)).

330. See *id.* (citing Lynda S. Doll & Beth A. Dillon, *Counseling Persons Seropositive for Human Immunodeficiency Virus Infection and Their Families*, in AIDS: ETIOLOGY, DIAGNOSIS, TREATMENT AND PREVENTION 533 (Vincent T. DiVita, Jr. et al. eds., 4th ed. 1997)).

331. See *id.* at 15-23.

332. *Id.* at 17 (emphasis added).

333. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 176 (4th Cir. 1997) (en banc).

334. See *id.*

335. See *id.* at 176-89.

336. See *id.* at 175.

337. See *id.* at 164-75 (applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

338. See *id.* at 164 (applying *McDonnell Douglas Corp.*, 411 U.S. at 792).

of the protected class ("a qualified individual with a disability" as defined by the ADA); (2) discharged; (3) performing his job at a level that met the employer's legitimate expectations at the time of his discharge; and (4) discharged under circumstances that raise a reasonable inference of unlawful discrimination.³³⁹

The majority devoted considerable attention to the contention that Runnebaum was an individual with a disability under the ADA because he was HIV-positive or was diagnosed with asymptomatic HIV infection.³⁴⁰ Although the previous court opinions involving Runnebaum did not undertake such analysis, the majority noted that the WWC and the EEOC appearing as amicus curiae took the position that asymptomatic HIV infection is a disability per se under the ADA.³⁴¹

Following the approach of all courts undertaking an analysis of whether HIV-infection is a disability, the majority in *Runnebaum II* began its analysis by considering the four-prong definition of disability in the ADA.³⁴² Following its own opinion in *Ennis*, the Fourth Circuit maintained that a finding of disability must be made on an individualized basis.³⁴³ The court avoided consideration of the suggestion made in the brief of the WWC that an individualized assessment does not preclude the fact that a particular condition constitutes a per se disability. It is clear, for example, that a case-by-case analysis of individuals who were blind would always result in a finding of disability because blindness would always constitute an impairment that would substantially limit the individual's major life activity of seeing.³⁴⁴

Instead, the majority proceeded to consider (1) whether asymptomatic HIV infection is a physical or mental impairment, and (2) whether asymptomatic HIV infection, if an impairment, substantially limits one or more major life activities.³⁴⁵ The majority was quick to note that the Supreme Court had yet to rule on the issue of whether asymptomatic HIV infection constituted an impairment, citing the footnote in *School Board of Nassau County v. Arline*, in which the Supreme Court in 1987 declined to reach a decision on the issue.³⁴⁶ Surprisingly, in the *Runnebaum II* opinion in 1997, the majority did not seem to have a clue as to the approach that would be taken by the Supreme Court in 1998.³⁴⁷ The Supreme Court in fact relied on a significant body of case law

339. *Id.* (construing 42 U.S.C. § 12,112(2) (1994) and citing *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995)).

340. *See id.* at 165-73.

341. *See id.* at 161 n.1, 165-66.

342. *See id.* at 166 (citing 42 U.S.C. § 12,102(2)).

343. *See id.* (citing *Ennis*, 53 F.3d at 59).

344. *See* Brief of Amicus Curiae, *supra* note 323, at 16-17, *Runnebaum v. NationsBank of Md.*, 123 F.3d 156 (4th Cir. 1997)).

345. *See Runnebaum II*, 123 F.3d at 167, 170 (citing 42 U.S.C. § 12,102(2)(A)).

346. *See id.* at 167 (citing *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 282 n.7 (1987) (declining to decide whether any asymptomatic HIV-infected person could be considered to have a physical impairment)).

347. *See Bragdon v. Abbott*, 524 U.S. 624 (1998).

developed after 1987 adopting an approach that considered relevant the extensive body of medical and scientific literature, the legislative history, the regulations promulgated by designated agencies, and the large body of judicial opinions considering the issue.³⁴⁸ The *Runnebaum II* majority found it easy to dismiss this body of authority as irrelevant even though the court in *Runnebaum I* repeatedly cited the district court opinion in *Abbott v. Bragdon*.³⁴⁹ The Supreme Court ultimately upheld this opinion overruling sub-silient a number of the findings adopted by the *Runnebaum II* majority. Rather, the *Runnebaum II* approach to determining the applicability of the ADA to the facts established by *Runnebaum* involves the court's use of a currently fashionable approach to statutory interpretation, embraced under the claim of judicial restraint that limits, wherever possible, judicial inquiry in statutory interpretation to the language of the statute under the rubric of plain language analysis.³⁵⁰ This *Runnebaum II* approach adopts three maxims of statutory interpretations: (1) "When confronted with a question of statutory interpretation, our inquiry begins with an examination of the language used in the statute;"³⁵¹ (2) Where "statutory language is plain and admits of no more than one meaning, the duty of interpretation does not arise" since the court should apply the statute in conformity to the language used,³⁵² and (3) When "a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."³⁵³

In taking this approach, the *Runnebaum II* majority does not follow the approach to statutory interpretation favored by most courts that begin their analysis with a consideration of the definition of "impairment" given by the designated federal agency, in this case the EEOC.³⁵⁴ Instead, the court looked to four separate dictionaries for the meaning of a term which it assumes to be understood as a matter of "standard" usage rather than as a matter of "statutory" usage and the intent of the drafters of the statute.³⁵⁵ The court focused on the

348. See *id.*

349. 912 F. Supp. 580 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997) (discussing issue of whether procreation and intimate sexual relations are "major life activities"), *and rev'd in part*, 524 U.S. 624 (1998). See *Runnebaum II*, 123 F.3d at 168-70 (citing *Abbot*, 107 F.3d at 939-41 (holding that asymptomatic HIV is always an impairment and that procreation is a major life activity)).

350. See *Runnebaum II*, 123 F.3d at 167.

351. *Id.* (citing *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996), *cert. denied*, 519 U.S. 1077 (1997)).

352. *Id.* (citing *United States v. Murphy*, 35 F.3d 143, 143-45 (4th Cir. 1994)).

353. *Id.* (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)).

354. See, e.g., *Anderson v. Gus Mayer Boston Store*, 924 F. Supp. 763, 773 n.18 (E.D. Tex. 1996) (citing 29 C.F.R., § 1630, app. to Part 1630-Interpretations Guidance to Title I of the APA § 1630.2(g) (1995)).

355. *Runnebaum II*, 123 F.3d at 167 (citing definition of term "impair" in BLACKS LAW DICTIONARY 677 (5th ed. 1981) ("To weaken, to make worse, to lessen in power, diminish, or relax or otherwise affect in an injurious manner"); WEBSTER'S II NEW REVISED UNIVERSITY DICTIONARY 612 (1988) ("[D]ecrease in strength, value, amount, or quality"); WEBSTER'S NINTH NEW

definition of "impair[ment]" as to "make worse by or as if by diminishing in some material respect" provided in *Webster's Ninth New Collegiate Dictionary*.³⁵⁶ From this type of definition the *Runnebaum II* majority adopted the totally unjustified view that an impairment must have some external observable physical "symptomatic" manifestation.³⁵⁷ The *Runnebaum II* majority reasoned that the required showing of impairment "cannot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength."³⁵⁸ According to the court: "[A]symptomatic HIV infection is simply not an impairment: without symptoms, there are no diminishing effects on the individual."³⁵⁹

The *Runnebaum II* majority misconstrued the meaning of both the term "impairment" and the term "asymptomatic HIV infection" because of its simplistic understanding of language, namely that words have a clear meaning independent of context and usage. The term "impairment" as it relates to the question of whether a person is disabled within the terms of the ADA is to be understood in the context of the Americans with Disabilities Act, enacted by Congress and enforced by designated agencies under duly promulgated regulations. The term "asymptomatic HIV infection" is to be understood in the context of medical usage rather than simply meaning "no symptoms." Certain facts about HIV infection have long been known. For example, an asymptomatic HIV-infected person's condition may not always be detectable by superficial physical observation even though such a person is infected and infectious,³⁶⁰ has a compromised immune system,³⁶¹ may not engage in "unprotected" intercourse without assuming the risk of infecting the sexual partner,³⁶² often cannot engage in specified sexual acts without violating criminal laws that imposes penalties for such sexual conduct,³⁶³ and may not engage in reproduction without some

COLLEGIATE DICTIONARY 603 (1986) ("[M]ake worse by or as if by diminishing in some respect"); and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1131 (1986) ("[D]eterioration" or "lessening"). Cf. definition of "impairment" in STEDMAN'S MEDICAL DICTIONARY 857 (26th ed. 1995) ("[a] physical or mental defect at the level of a body system or organ." The official World Health Organization definition is "any loss or abnormality of psychological, physiological or anatomical structure or function").

356. *Runnebaum II*, 123 F.3d at 168 (emphasis added) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 603 (1986)).

357. *Id.*

358. *Id.* (citing *Torres v. Bolger*, 781 F.2d 1134, 1138 (5th Cir. 1986)).

359. *Id.*

360. See generally *Redfield & Burke*, *supra* note 6, at 90.

361. See William Long et al., *Clinical, Immunologic, and Serologic Findings in Men at Risk for Acquired Immunodeficiency Syndrome: The San Francisco Men's Health Study*, 257 JAMA 326 (1987).

362. *Centers for Disease Control Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 MMWR 509 (1987).

363. See, e.g., FLA. STAT. § 384.24 (West 1998); 720 ILL. COMP. STAT. § 5/12-16.2(d) (West 1993); LA. REV. STAT. ANN. § 14:43.5 (West 1997).

likelihood of producing an infected child.³⁶⁴ The court, in regarding physical symptoms as the *sine qua non* of impairment, overlooks the fact that laboratory tests of asymptomatic HIV-infected persons would reveal the “diminishing” effects of HIV infection and the “decrease in strength, value, amount or quality” of the immune system of infected persons by revealing the presence of the virus in the blood cells of the HIV-infected person as well as by the reduction in the T-cell count of the individual indicating a suppressed immune system.³⁶⁵ Certainly, after the Supreme Court’s decision in *Arline*, the *Runnebaum II* court should have recognized that a finding of disability does not necessarily require obvious physical manifestation of symptoms.

Instead, the *Runnebaum II* court adopted a simple two-step analysis in order to reach the conclusion that asymptomatic HIV infection does not constitute an “impairment.” According to the court: (1) “[t]he plain meaning of ‘impairment’ suggests that asymptomatic HIV infection will never qualify as an impairment by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual”³⁶⁶; and (2) “[e]xtending the coverage of the ADA to asymptomatic conditions like Runnebaum’s where no diminishing effects are exhibited, would run counter to Congress’s intention as explained in the plain statutory language.”³⁶⁷

The *Runnebaum II* majority recognized that other courts had found asymptomatic HIV infection constituted an impairment under the ADA.³⁶⁸ However, the court construed these opinions as inappropriately relying on legislative history that the *Runnebaum II* court found ambiguous.³⁶⁹ For example, the House and Senate reports indicated that the term “mental or physical impairments” includes “infection with the Human Immunodeficiency Virus.”³⁷⁰ By employing the “plain” language approach, the court totally ignored the legislative record that indicated that Congress understand HIV infection, whether symptomatic or asymptomatic, to constitute a disability. The distinction was clearly known to the members of Congress enacting legislation and their intention to provide disability protection to those who suffered from asymptomatic HIV infection was consummately clear in the record, through

364. See, e.g., Edward M. Connor et al., *Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment*, 331 NEW ENG. J. MED. 1173 (1994).

365. See, e.g., Michael S. Saag, *Natural History of HIV-1 Disease*, TEXTBOOK OF AIDS MEDICINES 45, 49 (Samuel Broder et al. ed. 1994); CECIL, TEXTBOOK OF MEDICINE 1908 (James B. Wyngarden et al. eds., 19th ed. 1992).

366. *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 169 (4th Cir. 1997) (en banc).

367. *Id.* at 168.

368. See *id.* (citing *Abbott v. Bragdon*, 107 F.3d 934, 939 (1st Cir. 1997) (concluding that asymptomatic HIV infection is an impairment under the ADA), *rev'd in part*, 524 U.S. 624 (1998); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994)).

369. See *id.*

370. *Id.* at 168-69 (citing H.R. REP. NO. 101-485 (II), *reprinted in* 1990 U.S.C.C.A.N. § 303; H.R. REP. NO. 101-485 (III), *reprinted in* 1990 U.S.C.C.A.N. § 445; S. REP. NO. 101-116 (1989)).

statements in the contemporary Congressional Record.³⁷¹ However, the *Runnebaum II* majority maintained that “the isolated references to HIV infection in the Committee Reports do not distinguish between symptomatic and asymptomatic conditions as the plain meaning of ‘impairment’ requires.”³⁷² The court’s talisman of statutory interpretation, the plain meaning approach, allows it to reach what it views as an apparently transparent conclusion that “the statutory meaning of ‘impairment’ is plain and unambiguous. Accordingly, we have no reason to resort to the legislative history to ascertain Congress’s intent.”³⁷³

The *Runnebaum II* majority further considered whether asymptomatic HIV infection substantially limits one or more of the major life activities assuming *arguendo* that asymptomatic HIV infection constitutes an impairment.³⁷⁴ Noting that the ADA itself does not define “major life activity,” the court did not turn to the relevant EEOC regulations and related judicial interpretation. Instead the court invoked its vehicle of statutory interpretation, “ordinary and natural meaning.”³⁷⁵ The court’s analysis focused on dictionary definitions³⁷⁶ of the term “major” to reach the unsurprising understanding that “[t]hese definitions suggest that an activity qualifies under the statutory definition as one of the major life activities contemplated by the ADA if it is relatively more significant or important than other life activities.”³⁷⁷ The deficiency of the courts approach to statutory interpretation became clear when one compares it to the information one can quickly glean from an examination of the EEOC regulations and guidelines discussed earlier in this article.³⁷⁸

One aspect of the *Runnebaum II* analysis that may prove important in subsequent litigation relates to what the court suggested must be shown to be the relationship between the “major life activity” impaired by HIV infection and the individual plaintiff’s relationship to that activity, i.e., must it be an activity that the individual desires to or would be engaged absent the impairment.³⁷⁹ The *Runnebaum II* majority comes to the surprising conclusion that “courts need only consider whether the impairment at issue substantially limits the plaintiff’s ability to perform one of the major life activities contemplated by the ADA, not

371. See, e.g., 136 CONG. REP. H2626 (May 22, 1990) (remarks of Rep. McDermott) (“I am particularly pleased that this act will finally also extend necessary protection to people with HIV disease. These are individuals who have any condition along the full spectrum of HIV infection— asymptomatic HIV-infection, symptomatic HIV infection, or full blown AIDS.”).

372. *Runnebaum II*, 123 F.3d at 169.

373. *Id.* at 168 (citations omitted).

374. See *id.* at 170 (citing 42 U.S.C. § 12,102(2)(A) (1994)).

375. *Id.* (citing *Smith v. United States*, 508 U.S. 223, 228 (1993)).

376. See *id.* (citing WEBSTER II NEW RIVERSIDE UNIVERSITY DICTIONARY 718 (1988); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1986)).

377. *Id.*

378. Compare discussion of “major life activity” in *Runnebaum II*, 123 F.3d at 171, with 29 C.F.R. § 1630.2(i) (1999) and 29 C.F.R. Appendix to § 1630.2(i).

379. See *Runnebaum II*, 123 F.3d at 170.

whether the particular activity that is substantially limited is important to him."³⁸⁰ This view, of course, leaves open another aspect of the relationship between the impairment of HIV infection and the ability of the individual to otherwise engage in the activity; even if reproduction is a major life activity impaired by HIV-infection, would a post-menopausal woman, who would not be capable of engaging in reproductive activity, be regarded as disabled because of the effect of HIV-infection on the ability to engage in reproductive activity?

The *Runnebaum II* majority also addressed the question of whether procreation and intimate sexual relations are major life activities for the purpose of ADA disability coverage.³⁸¹ Conceding that each of these is a "fundamental human activity,"³⁸² the court, nevertheless expressed doubt as to whether these are "major life activities" under the ADA.³⁸³ Without deciding whether the activities are included within the meaning of major life activities under the ADA, the *Runnebaum II* majority concludes, that even assuming that they are covered activities, asymptomatic HIV-infection does not "substantially limit" the ability to procreate or engage in intimate sexual relations.³⁸⁴ The court gave significant weight to the 1988 DOJ Memorandum that opined that some courts might find asymptomatic HIV infection limits procreation because individuals will forego having children for fear of producing an infected child, and because individuals will forego intimate sexual relations because of fear of infecting others.³⁸⁵ However, in the courts view the 1988 DOJ Memorandum equivocated on this issue since it stated that "there is nothing inherent in the [HIV] infection which actually prevents either procreation or intimate [sexual] relations."³⁸⁶

The court further held that asymptomatic HIV infection does not limit procreation or intimate sexual relations for purposes of the ADA.³⁸⁷ The court reasoned that asymptomatic HIV infected individuals can and have procreated and have engaged in intimate sexual relations.³⁸⁸ The court sees the decision to be one of behavior and mores and not one involving a "causal nexus between the physical effect of the impairment and one of the major life activities."³⁸⁹ One

380. See *id.* (citing *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir. 1997), *rev'd in part*, 524 U.S. 624 (1998)).

381. See *id.* at 170-72.

382. *Id.* at 170 (citing WWC Brief at 19-20; EEOC Brief at 17).

383. *Id.* (citing *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that procreation is not one of the major life activities under the ADA); *Zatarin v. WDSU Television, Inc.*, 79 F.3d 1143 (5th Cir. 1996), *aff'g* 881 F. Supp. 240, 243 (E.D. La. 1995)).

384. *Id.* at 172.

385. See *id.* at 171-72 (discussing Memorandum from Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel to Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988), *reprinted in* 8 FAIR EMPL. PRAC. MANUAL (BNA) No. 641 at 405:4-7 [hereinafter *Kmiec Memorandum*]).

386. *Id.* at 171 (citing *Kmiec Memorandum*, *supra* note 385, at 405:7).

387. See *id.* at 172.

388. See *id.*

389. *Id.* (construing 42 U.S.C. § 12,102(2)(A) (1994)).

might observe that under this analysis a monk who had undertaken the vow of silence would not be disabled because his decision not to speak was not a matter of physical inability but a choice made in pursuance of self mortification.

To some extent, one must question the integrity of the court's reasoning in *Runnebaum II*. It is pervaded with inconsistency. When accused by the dissent of taking the position that asymptomatic HIV-infection is per se not a disability, the majority countered with the statement "[t]he dissent would, perhaps, have us hold that asymptomatic HIV infection is per se not a disability under the statute. As we discuss below, however, we decline to go so far."³⁹⁰ Later, however, the court concluded "[t]he plain meaning of 'impairment' suggests that asymptomatic HIV infection will never qualify as an impairment: by definition, asymptomatic HIV infection exhibits no diminishing effects on the individual."³⁹¹ Similarly, the court initially took the position that "courts need only consider whether the impairment at issue substantially limits the plaintiff's ability to perform one of the major life activities contemplated by the ADA, not whether the particular activity that is substantially limited is important to him."³⁹² In complete contradiction to this position, the court determined that even if procreation and intimate sexual relations are major life activities, the lack of evidence of Runnebaum's intention to otherwise engage in these activities precluded a finding that he was disabled.³⁹³ The *Runnebaum II* majority reasoned:

Even if the statute permitted a finding that asymptomatic HIV infection substantially limits procreation and intimate sexual relations because of a person's response to the knowledge of his infection, there is no evidence in the record that Runnebaum, because of his infection, forewent having children or engaging in intimate sexual relations. Nothing in the record indicates that Runnebaum refrained from having children out of fear that he would pass the virus on to his child. Indeed, nothing in the record so much as suggests that Runnebaum was at all interested in fathering a child. Moreover, the record makes clear that Runnebaum's ability to engage in intimate sexual relations was not substantially limited by his HIV infection; the record shows that he concealed his HIV infection from his lover. Ergo, Runnebaum's HIV infection, if an impairment, does not substantially limit one or more of the major life activities³⁹⁴

The court's straightforward ability to take contrary positions is only exceeded by its arrogance in concluding that Runnebaum's decision not to disclose his HIV status to his partner meant that he was having unprotected sexual relations with

390. *Id.* at 167. *Cf. id.* at 176 (Michael, J., dissenting).

391. *Id.* at 169.

392. *Id.* at 170.

393. *See id.* at 172.

394. *Id.*

his lover of the kind that would facilitate transmission of HIV.³⁹⁵ Finally, the court turned a blind eye to the existence of criminal statutes providing severe penalties for individuals who engage in intimate sexual relations of the type likely to facilitate transmission of HIV.³⁹⁶

After expounding at length on whether Runnebaum was disabled, an issue apparently conceded at the trial level,³⁹⁷ the court turned to the actual claim that NationsBank fired Runnebaum because it regarded him as having an impairment that substantially limited one or more of the major life activities.³⁹⁸ The court concluded that none of the evidence submitted by Runnebaum was sufficient to create a genuine issue of material fact establishing that NationsBank perceived Runnebaum as disabled.³⁹⁹ Moreover, the court concluded that the evidence did not show that Runnebaum was meeting his employer's legitimate expectations, nor did the evidence show that Runnebaum's termination took place under circumstances raising a reasonable inference of discrimination.⁴⁰⁰

The extensive dissent in *Runnebaum II*⁴⁰¹ not only came to different conclusions on every issue discussed by the majority, but also expressed the opinion that there was a disingenuousness in the majority's opinion particularly with regard to the majority's position that "Runnebaum produced no evidence showing that he was impaired, to any degree, during the relevant time period."⁴⁰² The dissent points out that at the trial level hearing on the motion for summary judgment, the employer conceded the issue of existence of "impairment;" therefore, no evidence was presented on this issue.⁴⁰³ It is clear from the record that NationsBank conceded that Runnebaum was disabled under the terms of the

395. See *id.* Cf. *id.* at 185 (Michael, J., dissenting):

Regarding intimate sexual relations, the majority makes the bold assertion: "the record makes clear that Runnebaum's ability to engage in intimate sexual relations was not substantially limited by his HIV infection; the record shows that he concealed his HIV infection from his lover." . . . That is too much of a leap for me. I would not presume to know the status of Runnebaum's 'intimate sexual relations' merely because he has a boyfriend.

396. See, e.g., FLA. STAT. § 384.24 (West 1998); 720 ILL. COMP. STAT. § 5/12-16.2(d) (West 1993); LA. REV. STAT. ANN. § 14:43.5 (West 1997).

397. Compare *Runnebaum II*, 123 F.3d at 177-78 (where the dissent maintains the defendant conceded Runnebaum's disability in district court), with *id.* at 165 n.4 (where the majority asserts that the district court merely assumed "for the purpose of the [summary judgment] motion, that even an asymptomatic HIV infection may be a disability . . ." concluding "[w]hether asymptomatic HIV infection is a disability under the statute is primarily a question of law, the facts pertaining to this issue are sufficiently developed, and the issue was briefed [by Runnebaum's counsel] and argued on appeal.").

398. See *id.* at 172-76.

399. See *id.* at 173-76.

400. See *id.* at 175-76.

401. See *id.* at 176-90 (Michael J., dissenting).

402. *Id.* at 178 (citing *id.* at 169 (majority opinion)).

403. *Id.* at 177.

ADA and, consequently he suffered the necessary "impairment."⁴⁰⁴ In its memorandum to support a motion for summary judgment, NationsBank acknowledged that the plaintiff "is a member of a protected class (HIV-positive being a protected category under 42 U.S.C. § 12,102([2])."⁴⁰⁵ The dissent also quoted Runnebaum's lawyer's statement at the en banc hearing where the lawyer states in part "[i]t was assumed that he [Runnebaum] met the standards under the Act to be disabled, and the whole case was premised, discovery and everything was premised from that point forward, on the fact that it was conceded that he was disabled."⁴⁰⁶

The dissent also observed that the majority did not develop an accurate account of the disabling effects of asymptomatic HIV infection.⁴⁰⁷ The dissent cited medical authorities that describe the effect of the virus' immediate attack on the immune system, along with the presence of the virus and its reproduction in the hemic (blood) and lymphatic systems with measurable decline in CD4 cell counts.⁴⁰⁸ The dissent explicitly rejected the majority's contention that an ADA impairment must involve the exhibition of observable physical symptoms. Instead, the dissent maintained "[n]owhere does the text of the statute, however, require a 'physical impairment' to be outwardly visible or manifest. The effects of the HIV virus may not be noticeable to the outside world until the later stages of the disease, but the body is impaired as soon as the disease enters it."⁴⁰⁹ Moreover the dissent takes notice of the Fourth Circuit's own opinion in *Doe v. University of Maryland Medical System, Corp.*, where the court found an HIV-infected surgeon not otherwise qualified to carry out his surgical functions because of his HIV infection, for the proposition that infectiousness or contagiousness might constitute an impairment establishing the basis for a claim that an individual was disabled within the meaning of the ADA.⁴¹⁰ Next the dissent faulted the majority for its total disregard of legislative history, regulatory interpretation, and the substantial body of judicial construction that runs directly

404. *Id.*

405. *Id.* (citing trial transcript).

406. *Id.* at 178 (citing en banc Oral Argument, Mar. 5, 1997).

407. *See id.* at 180.

408. *See id.* (citing CECIL, *supra* note 365, at 1908) (describing slow progressive decline in CD-4 positive cells); Martin A Nowak, *AIDS Pathogenesis: From Models to Viral Dynamics in Patients*, 10 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES & HUMAN RETROVIROLOGY, S1 (Supp. 1, 1995) (noting effect of infection in viral levels and decline in CD4 cell counts); Saag, *supra* note 365, at 46 (describing infection resulting in acute retroviral seroconversion syndrome); Christine Gorman, *Battling the AIDS Virus: There's Still No Cure, but Scientists and Survivors Make Striking Progress*, TIME, Feb. 12, 1996, at 62 (virus is active in body from time of infection)).

409. *Id.* at 181 (citing Letter from C. Everett Koop, M.D., Surgeon General to Douglas W. Kmiec, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, reprinted in 8 FAIR EMPL. PRAC. MANUAL (BNA) No. 641 at 405:18, 405:19).

410. *See id.* at 181 n.5 (citing *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995) (potential for HIV transmission by infected surgeon made him not otherwise qualified)).

contrary to the various conclusions of the majority.⁴¹¹

While the dissent did not totally reject the "plain meaning" approach to statutory interpretation, the dissent maintained that the statutory terms of the ADA are sufficiently ambiguous to require guidance from the legislative history and implementing regulation.⁴¹² The dissent observed that both the House and Senate Committee Reports accompanying enactment clearly stated that HIV infection is to be considered an ADA impairment.⁴¹³ Moreover, specific remarks of certain sponsors are unequivocal. For example, the statement of Senator Kennedy noting that "in the particular provision of the legislation we have pointed out very clearly, if you are asymptomatic and HIV positive, you are protected."⁴¹⁴ In addition, the dissent found confirming support in the relevant implementing regulations of the agency, designated by Congress, that are virtually ignored by majority.⁴¹⁵

The dissent next examined the requirement of the ADA that the impairment substantially limit one or more major life activities.⁴¹⁶ The dissent concluded that the language of the statute, the legislative history, and implementing regulations all support the view that procreation and intimate sexual activity are major life activities.⁴¹⁷ The dissent directed attention to the distinction drawn by the majority between "substantially limiting as a physical matter" and "substantially limiting as a behavioral matter."⁴¹⁸ The dissent noted that this distinction finds no basis in the statutory text and stated, "[t]here is no requirement that the impairment physically limit that life activity, nor is there any specification about how the impairment must substantially limit that activity."⁴¹⁹ Neither is there any basis in the legislative history, nor in the implementing EEOC regulations for the distinction drawn by the majority.⁴²⁰ The dissent concluded that "[t]he majority's

411. *See id.* at 181-83.

412. *Id.* at 181 (citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 508 (1989) ("[C]oncluding that the text is ambiguous . . . we seek guidance from legislative history. . ."); *Torcasio v. Murray*, 57 F.3d 1340, 1353 (4th Cir. 1995) (finding the ADA's textual definition of "disability" to be "unilluminating")).

413. *See id.* (citing H.R. REP. NO. 101-485, pt. 2 at 51, *reprinted in* 1990 U.S.C.C.A.N. § 303, 333) ("It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments The term includes, however, such conditions, diseases, and infections as . . . infection with the Human Immunodeficiency Virus. . ."). *Accord* S. REP. NO. 101-116 at 22 (1989).

414. *Id.* at 182 (citing 135 CONG. REC. S10768 (daily ed. Sept. 7, 1989) (statement of Sen. Kennedy)).

415. *See id.* at 182-83 (citing 29 C.F.R. § 1630.2(h)(1) (EEOC) (1999)).

416. *See id.* at 183.

417. *See id.* at 183-85 (citing the ADA, 42 U.S.C. § 12,102(2)(A) (1994); H.R. REP. NO. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. §§ 303, 304; EEOC regulations at 29 C.F.R. § 1630.2(C)).

418. *Id.* at 184.

419. *Id.*

420. *See id.* (citing 29 C.F.R. § 1630.2(j)(ii)).

distinction goes against common sense. The majority claims that 'as a physical matter, nothing inherent in the virus substantially limits procreation or intimate sexual relations.'⁴²¹ The dissent maintained that contrary to the view of the majority "[i]t is HIV's physical effects, however, upon procreation and intimate sexual relations that make it substantially limiting. An individual with HIV stands a significant chance of infecting others if he engages in these activities, and this prospect of spreading the disease is a substantial impairment."⁴²²

The dissent also came to a conclusion opposite of the majority on the issue of whether Runnebaum has presented enough evidence to support his claim of discrimination based on his "being regarded as having such an impairment."⁴²³ The evidence cited by the dissent includes the opening of Runnebaum's AZT packages by bank employees, the reaction of Runnebaum's fellow bank employee upon learning of Runnebaum's infection, and the fact that the supervisor who fired Runnebaum was informed of Runnebaum's HIV infection before he was actually terminated.⁴²⁴ The dissent concluded contrary to the majority, that when all the evidence is considered fully and all reasonable inferences are made in Runnebaum's favor "it becomes clear that there is a genuine factual issue about whether the bank considered Runnebaum to be disabled."⁴²⁵ Moreover, the dissent concluded Runnebaum presented evidence that the employer knew of his HIV status and that the reasons given for his firing were pretextual.⁴²⁶ The inescapable conclusion, according to the dissent, is that Runnebaum's evidence created an issue of material fact as to whether Runnebaum was the subject of disability discrimination because he was "regarded as" having a disability.⁴²⁷

If the view of the majority in *Runnebaum II* were to prevail, asymptomatic HIV-infected individuals would be precluded from claiming protection from discrimination under the American with Disabilities Act, the Rehabilitation Act of 1973, and other legislation using comparable terms of "disability," "impairment" and "substantially limiting one or more major life activities." For all practical purposes, the opinion of *Runnebaum II* set down a rule that individuals with asymptomatic HIV infection are per se not individuals with a disability. The approach taken in *Runnebaum II* relied on a theory of "plain meaning" interpretation that not only ignores the intent of Congress, the implementation by designated agencies under lawfully promulgated regulations, and a developed body of case law, but also employed a doubtful approach to language itself. The history of the ADA (and the Rehabilitation Act before it) belies any basis for claiming that the statute is to be interpreted by a "plain meaning" approach. The *Runnebaum II* majority's approach simply ignores the

421. *Id.* at 185.

422. *Id.* (citing Kmiec Memorandum, *supra* note 385, at 405:1, 405:7).

423. *Id.* at 188.

424. *See id.* at 187-88.

425. *Id.* at 186.

426. *See id.* at 188.

427. *Id.* at 188-89.

issuance of regulations by an agency, the EEOC, designated in the statute by Congress to promulgate regulations providing guiding definitions for such statutory terms as "impairment," "major life activities," and "substantial limitation. If the *Runnebaum II* approach were to prevail, ADA protection of the disabled in the context of AIDS would likely be meaningless, since the physical impairment that the *Runnebaum II* court apparently required would likely be so sufficiently debilitating that the individual at that stage of HIV disease would not be otherwise qualified. The approach of the *Runnebaum II* majority clearly undermines the objectives of Congress to exercise a "clear and comprehensive national mandate" to eliminate discrimination against individuals with disabilities, including those with HIV infection.⁴²⁸

VIII. THE UNITED STATES SUPREME COURT FINDS ASYMPTOMATIC HIV INFECTION AN IMPAIRMENT THAT CAN SUBSTANTIALLY LIMIT MAJOR LIFE ACTIVITIES OF AN INDIVIDUAL

In *Bragdon v. Abbott*⁴²⁹ the United States Supreme Court attempted to provide some guidance in determining the extent to which persons with AIDS and HIV infection are included within the group of persons who are protected from unjustified discrimination under the Americans with Disabilities Act.⁴³⁰ This is the first case that the Supreme Court has heard involving AIDS or HIV-infection.⁴³¹ While the court seems to have set out a definitive statement that AIDS and HIV-infection, whether symptomatic or asymptomatic, constitute an "impairment" under the terms of the ADA, the Court was less clear on the ultimate question of "disability" protection because of its treatment of the requirement that an impairment "substantially limits major activities of such individuals." The Court clearly determined that AIDS and HIV infection are not per se disabilities.

The case arose in 1994 when Sidney Abbott, who knew that she had been infected with HIV for at least nine years but remained asymptomatic, went to the office of her dentist Randon Bragdon for a scheduled dental appointment.⁴³² After Abbott disclosed her HIV infection on a registration form, the dentist examined her teeth and diagnosed a cavity. The dentist then informed the patient of his policy against filling cavities of HIV-infected patients in his office. However, the dentist offered to perform the work on Abbott's cavity at a hospital with no added fee, although Abbott would be required to pay the hospital for any charge for use of its facilities. Abbott refused Bragdon's offer and brought suit

428. 42 U.S.C. § 12,101(B)(1) (1994).

429. 524 U.S. 624 (1998).

430. *See id.*

431. *See* Michael Closen, *The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights*, 61 ALA. L. REV. 897 (1998).

432. *See Bragdon*, 524 U.S. at 628.

against him under Title III of the ADA,⁴³³ and the Maine Human Rights Act (MHRA),⁴³⁴ which was not addressed by the Supreme Court.⁴³⁵

The federal district court, considering motions for summary judgment filed by both parties, primarily addressed the question of applicability of Title III of the ADA, although it found that the defendants' conduct violated both the ADA and the MHRA.⁴³⁶ Under Title III of the ADA, a place of public accommodation may not discriminate against an individual on the basis of disability in the full and equal enjoyment of services.⁴³⁷ However, places of public accommodation may deny full and equal services to an individual who poses a direct threat to others.⁴³⁸ Accordingly, the district court found it was faced with a three step analysis: (1) whether the dentist's office constituted a place of public accommodation; (2) whether the plaintiff has a disability within the terms of the ADA; and (3) whether the requested treatment in the dentist's office does not pose a direct threat to the health or safety of others.⁴³⁹ The court's discussion focused on the latter two issues since the defendant did not dispute that his office was a place of public accommodation; moreover, the court found that the statutory language and interpretative regulations issued by the Department of Justice, the agency designated in the statute, provide authority for treating the professional office of a health care provider as a place of public accommodation.⁴⁴⁰ The defendant challenged plaintiff's claim with regard to her disability status on the ground that: (1) asymptomatic HIV does not constitute a per se disability, and (2) the plaintiff did not present evidence that her asymptomatic HIV infection substantially limits any major life activity.⁴⁴¹

The district court recognized that the ADA does not expressly refer to AIDS or HIV infection within the language of the statute, nor does the statute specifically refer to any other disease or condition as a per se disability.⁴⁴² In order to determine the applicability of the ADA to a specific disease or condition, the court recognized the need to apply the regulations promulgated by the agency which had been delegated authority by Congress under a provision of the statute, to determine whether an individual with HIV infection has an impairment that substantially limits a major life activity.⁴⁴³ The court concluded that

433. 42 U.S.C. § 12,182(a).

434. ME. REV. STAT. ANN. tit. 5, § 4592(1) (West 1989).

435. See *Bragdon*, 524 U.S. at 629 ("The state law claims are not before us.").

436. See *Abbott v. Bragdon*, 912 F. Supp. 580, 596 (D. Me. 1995) (concluding that defendant's conduct violated the ADA, 42 U.S.C. § 12,182(b)(2)(A)(i) and the Maine Human Rights Act, ME. REV. STAT. ANN. tit. 5, § 4592(1)), *aff'd*, 107 F.3d 934 (1st Cir. 1997), and *rev'd in part*, 524 U.S. 624 (1998).

437. See *id.* at 584-85 (construing 42 U.S.C. § 12,182(2)).

438. See *id.* at 585 (construing 42 U.S.C. § 12,182(b)(3)).

439. See *id.*

440. See *id.* at 585 n.1 (citing 28 C.F.R. § 36.104 (1996)).

441. See *id.* at 585.

442. See *id.*

443. See *id.*

asymptomatic HIV infection does constitute an impairment within the meaning of the ADA based on (1) the interpretative guidelines provided by the agency designated by statute, i.e., the Department of Justice,⁴⁴⁴ and (2) a significant body of judicial opinions that had reached the conclusion that HIV infection constitutes a physical impairment.⁴⁴⁵ The court did not find it necessary to make an independent inquiry into the physical effects of HIV infection during the asymptomatic stage nor to consider the medical side effects of asymptomatic HIV infection treatment.

However, the district court refused to follow other courts that assumed that since the interpretative guidelines, promulgated by the D.O.J., included HIV among physical or mental impairments, the plaintiff was disabled for purposes of the ADA.⁴⁴⁶ Instead the court felt constrained to inquire whether the plaintiff's asymptomatic HIV infection substantially limited one or more of her major life activities.⁴⁴⁷ The district court accepted the plaintiff's claim that her asymptomatic HIV infection substantially limited her reproductive activity because of potential infection of an offspring, and because of detrimental health consequences to her from carrying out any pregnancy.⁴⁴⁸ The court found reproduction to be among the most fundamental of human activities.⁴⁴⁹ Although the court recognized that the relevant agency guidelines were "somewhat murky" on what was a major life activity,⁴⁵⁰ the court concluded that the language of the ADA employing the term "major life activity,"⁴⁵¹ and the weight of judicial authority that had considered the issue recognizing reproduction as constituting a major life activity,⁴⁵² persuaded the court that "reproduction constitutes a major life activity for the purposes of the ADA."⁴⁵³

The court specifically rejected a number of counter arguments. Specifically the court rejected the argument that asymptomatic HIV infection did not physically prevent reproduction the way that infertility would.⁴⁵⁴ Citing the language of the statute requiring an impairment that "substantially" limits a

444. *See id.* (citing 28 C.F.R. § 36.104).

445. *See id.*

446. *See id.* at 585 n.2 (citing *United States v. Morvant*, 898 F. Supp. 1157, 1161 (E.D. La. 1995); *D.B. v. Bloom*, 896 F. Supp. 166, 170 (D.N.J. 1995)).

447. *See id.*

448. *See id.* at 585-86.

449. *See id.* at 586.

450. *Id.* (citing 28 C.F.R. § 36.104 (1996); noting *Zatarain v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995) (finding reproduction does not constitute a major life activity for the purposes of the ADA, reasoning that one does not engage in reproduction with the same frequency as walking, seeing, speaking, hearing, learning and working)).

451. *Id.* (citing *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1320 (E.D. Pa. 1994)).

452. *See id.* (citing *Erickson v. Northeastern Ill. Univ.*, 911 F. Supp. 316, 321 (N.D. Ill. 1995); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404-05 (N.D. Ill. 1994); *Kohn Nast & Graf, P.C.*, 862 F. Supp. at 1320-21; *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990)).

453. *Id.*

454. *See id.* at 586-87.

major life activity, the court concluded that "the statute does not contemplate a complete inability of that individual to engage in a particular major life activity."⁴⁵⁵ The court found three features of human reproduction that were limited by the fact a woman is HIV infected including: (1) further danger to a mother's immune system resulting from pregnancy; (2) risk of infecting a child during pregnancy, through child birth, or through breast feeding; (3) or fear of being unable to care for the child beyond the act of conception and period of gestation.⁴⁵⁶

While the issue of other major life activities was raised, including limitations on the intimate sex life of an asymptomatic HIV-infected individual, the court declined to consider this issue because no evidence was presented on the matter, and because, in the court's view, the statutory language of the ADA requires "an individual determination of substantial limitation."⁴⁵⁷ This view, of course, leaves uncertain the extent of protection provided by the ADA to asymptomatic HIV-infected persons, an issue that remains even after the issuance of the Supreme Court's opinion in the case.

Concluding that Abbott was disabled for purposes of Title III of the ADA, the district court undertook the determination of whether treating Abbott in the dentist's office posed a direct threat to the health and safety of others.⁴⁵⁸ The plaintiff provided the testimony of an expert witness to establish that implementation of Centers for Disease Control (CDC) recommended precautionary measures eliminated any significant risk that in-office treatment would otherwise pose.⁴⁵⁹ The defendant maintained that significant risk was established by: (1) the obviousness of risk in filling a cavity through the use of a needle to inject anesthetic creates risk of transmission through percutaneous needle stick injury, and drilling of the decayed cavity creates risk of transmission through spattering and misting of blood and blood saliva;⁴⁶⁰ (2) by the report of forty-two documented cases of health care workers who have suffered occupational transmission of HIV and a report that six percent of all infected health care workers (as compared to four percent of the general public) do not have identified risk factors for infection;⁴⁶¹ and (3) by a line of case law in which courts have held the suspension or termination of infected health care workers does not constitute discrimination under Title III.⁴⁶²

Nevertheless, the court found the defendant's arguments unconvincing, reasoning that they either involved speculation, or relied on case law that was

455. *Id.* at 587 (construing 42 U.S.C. § 12,102(2)(A) (1994)); *see also id.* at 587 n.5.

456. *See id.* (citing plaintiff's deposition).

457. *Id.* at 586 n.4.

458. *See id.* at 587 (construing 42 U.S.C. § 12,182(b)(3)).

459. *See id.* at 587-88 (citing CDC, RECOMMENDED INFECTION—CONTROL PRACTICES FOR DENTISTRY (1993)).

460. *See id.* at 588.

461. *See id.*

462. *See id.* at 589-90.

inapposite.⁴⁶³ The court concluded that the defendant did not meet the requirements for summary judgment by providing evidence or judicial authority that supported the conclusion that treatment of the plaintiff in his office constituted a direct threat to the health and safety of others.⁴⁶⁴ The court concluded that the plaintiff had refuted defendant's speculative evidence with the testimony of a reasonable medical official, in this case an employee of the CDC whose testimony supported the claim that treatment could be rendered to Abbott in the dentist's office without any direct threat to the health or safety of Bragdon and others.⁴⁶⁵ The district court granted summary judgment for the plaintiff and enjoined the defendant from refusing to provide treatment in his office to individuals infected with HIV solely on the basis of their HIV positive status.⁴⁶⁶

The United States Court of Appeals for the First Circuit affirmed the district court's grant of summary judgment on Abbott's claim of violation of the public accommodation title of the ADA based on the defendant dentist's refusal to treat her because she was HIV positive.⁴⁶⁷ The court of appeals agreed that Abbott was a disabled individual within the purview of the ADA, and that providing her care would not have posed a direct threat to the health or safety of others.⁴⁶⁸

While the court of appeals recognized the ADA was intended to send "a clear message to those who operate places of public accommodation [that] you may not discriminate against individuals in the full and equal enjoyment of services on the basis of a disability,"⁴⁶⁹ the court recognized that it was constrained by the terms of the statute to first determine those who are qualified for protection against discrimination with reference to the criteria of "disability." The court made it clear that the "question is first and foremost a question of statutory construction."⁴⁷⁰

Following the traditional approach to statutory interpretation the court began "with the words of the statute."⁴⁷¹ Citing the three-prong definition of disability in the ADA, the court determined that it was required to determine whether Abbott had a disability by finding whether she has (1) a physical or mental impairment; (2) whether the impairment adversely affected a major life activity; and (3) whether the impairment substantially limited her ability to engage in the particular activity.⁴⁷²

The court of appeals easily found the existence of an impairment, concluding

463. *See id.*

464. *See id.* at 591.

465. *See id.*

466. *See id.* at 596.

467. *See Abbott v. Bragdon*, 107 F.3d 934, 934-37 (1st Cir. 1997), *rev'd in part*, 524 U.S. 624 (1998).

468. *See id.* at 937.

469. *Id.* at 938 (citing 42 U.S.C. § 12,182(2) (1994)).

470. *Id.* (citing *Strickland v. Commissioner, Me. Dep't of Human Serv.*, 96 F.3d 542, 545 (1st Cir. 1996)).

471. *Id.* (citing *United States v. Gibbens*, 25 F.3d 28, 33 (1st Cir. 1994)).

472. *See id.* at 938-39.

that implementing the relevant agency regulations and the existing body of judicial authority established that "HIV-positive status, simpliciter, whether symptomatic or asymptomatic, comprises a physical impairment under the ADA."⁴⁷³

The court of appeals found the issue of "major life activity" more problematic. It was noted that the statute does not define the terms at issue, and the existing case law was divergent on exactly what constitutes a major life activity.⁴⁷⁴ While viewing the question as "very close," the court of appeals concluded that "[r]eproduction (and the bundle of activities that it encompasses) constitutes a major life activity because of its singular importance to those who engage in it, both in terms of its significance in their lives and in terms of its relation to their day-to-day existence."⁴⁷⁵ While the court repeatedly spoke in terms of reproductive activity, the court took the view that reproduction is a multifaceted activity including the "ability to engage in intimate sexual activity, gestation, giving birth, childrearing, and nurturing familial relations."⁴⁷⁶

Unlike the Fourth Circuit in *Runnebaum II*, which took a plain meaning approach to statutory instruction, the First Circuit approached the process of construing the meaning of the terms "major life activities" in the context of the statute with reference to prior use of the terms by Congress, and by examining the construction given by implementing agencies. The court approached the process as a sophisticated multi-step process. The first step taken by the court involved consideration of the ordinary meaning of the term:

- (1) Because the term "major life activities" is not defined in the enactment, we are obliged to construe it in accordance with its natural (that is, ordinary) meaning. The Court has looked to familiar dictionary definitions in similar situations. Following that model here lends support to the classification of reproduction as a major life activity. The plain meaning of the word "major" denotes comparative importance. These definitions strongly suggest that the touchstone for determining an activity's inclusion under the statutory rubric is its significance—and reproduction, which is both the source of all life and one of life's most important activities, easily qualifies

473. *Id.* at 939 (citing 28 C.F.R. § 36.104 (1996)). The court mistakenly attributed these regulations to the EEOC; however, these regulations were promulgated by the delegated agency under Title III., the DOJ and *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994).

474. *See Abbott*, 107 F.3d at 939 (comparing *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996) (finding that reproduction is a major life activity); *Erickson v. Board of Governors of State Colleges*, 911 F. Supp. 316, 323 (N.D. Ill. 1995); *Cain v. Hyatt*, 734 F. Supp. 671, 679 (E.D. Pa. 1990) with *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (holding that reproduction is not a major life activity); *Zatarin v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995)).

475. *Id.* at 941.

476. *Id.* at 939.

under that criterion.⁴⁷⁷

Second, the court looked to past Congressional usage and the context within which Congress chose the terms being construed:

- (2) Congress lifted the term “major life activities” from the Rehabilitation Act of 1973, which used it in defining an “individual with handicaps.” In that milieu the term was accorded “a broad definition, one not limited to so called ‘traditional handicaps.’” In transplanting this combination of words from the soil of the Rehabilitation Act to that of the ADA, Congress specifically directed retention of the original meaning. Had Congress sought to confine the definition of disability narrowly, it surely would have written new, more restrictive language instead of borrowing a descriptive phrase notable for its breadth. It would be wholly inconsistent with this history to hold that Congress did not envision reproduction as a major life activity.⁴⁷⁸

Third, the court of appeals considered highly relevant the regulations and interpretive guidance provided by the administrative agency that was delegated authority by Congress to promulgate such regulations:

- (3) [W]e are guided by the regulations, which define “major life activities” to mean . . . functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. As the regulation itself clearly indicates, this enumeration is not meant to be exclusive, and reproduction—one of the most natural of endeavors—fits comfortably within this sweep. Furthermore, the portion of the regulations which defines physical impairments to include physiological disorders affecting the reproductive system, militates in favor of the same outcome. From the scope of the latter regulation, we deduce that its drafters considered reproduction to be a major life activity—otherwise, including reproductive disorders among the regulation’s roster of physical impairments would not have made much sense.⁴⁷⁹

Fourth, the court of appeals undertook an effort to determine the intent of Congress when it enacted the ADA using the statutory language at issue:

- (4) [O]ur mission in cases of statutory construction is to discern the

477. *Id.* at 939-40 (citations omitted). Among the authorities cited are two dictionaries, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1084 (3d ed. 1992) (defining “major” as “greater than others in importance or rank”), and WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY, 718 (1989) (defining “major” as “greater in dignity, rank, importance, or interest”).

478. *Abbott*, 107 F.3d at 940 (citations omitted).

479. *Id.* (citing 28 C.F.R. § 36.104 (1996); 45 C.F.R. § 84.3(j)(2)(ii) (a regulation implementing the Rehabilitation Act of 1973)).

legislature's intent. The result that we reach here comports with evidence in the legislative archives that Congress deemed HIV-infected individuals to be disabled under the ADA. Moreover, the ADA's precursor, the Rehabilitation Act, had been construed by the Department of Justice (DOJ) to protect persons infected with HIV from discrimination; in enacting the ADA, Congress endorsed the DOJ's view, noting that "a person infected with [HIV] is covered under the first prong of the definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relations."⁴⁸⁰

This approach to statutory language cannot be faulted for failure to give due deference to the actual wording of the statute. Nevertheless, rather than assuming that words have meaning in the abstract, the court of appeals approach considers ordinary usage as establishing the parameters for meaning, but not sufficient for establishing the actual meaning. The context in which the use of the words occurs is stressed, along with the interpretive guidance provided by the agency delegated authority to promulgate supporting regulations. This approach is certainly more likely to reach an understanding of the language of a statute as intended by the drafters of the legislation, than one that assumes words have some meaning without reference to context or usage.

The court of appeals considered and rejected a number of arguments that would militate against recognition of reproduction as a major life activity including: (1) the assertion that reproduction represents a lifestyle choice, and an activity in which many choose not to engage;⁴⁸¹ and (2) the claim that "reproduction" is to be distinguished from such activities as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working based on the frequency of performance.⁴⁸² The court of appeals, on the contrary, finds "[t]here is no evidence that Congress intended either frequency or universality to operate as a restriction on the definition of 'major life activities.'⁴⁸³ Similarly, the court noted that the assertion that reproduction is a life style choice is without merit because voluntary restraint in no way denies a life activity its significance. As the court notes "[s]peaking is undoubtedly a major life activity, but there are those (say, monks who have taken vows of silence) who choose to eschew it."⁴⁸⁴

While the court of appeals does not reach a dispositive position, it does consider whether it is necessary for a particular individual with an impairment to show that he or she would otherwise engage in the major life activity that is

480. *Id.* at 942-43 (citing H.R. REP. NO. 101-485, at 28 n.18 (1990), *reprinted in* 1990 U.S.C.C.A.N. § 445).

481. *See id.* at 940.

482. *Id.*

483. *Id.* at 941.

484. *Id.*

substantially limited by the impairment.⁴⁸⁵ The court of appeals suggests that the individualized finding that the impairment substantially limits a major life activity is not a particularized determination.⁴⁸⁶ According to the court of appeals, “[t]he need for this case-by-case analysis of disability does not necessarily require a corresponding case-by-case inquiry into the connection between the plaintiff and the major life activity.”⁴⁸⁷ The court suggests “it might be enough for a court to consider only whether a given impairment substantially limits a particular plaintiff without considering whether the activity is of particular import to her.”⁴⁸⁸ Since the instant case took the form of a grant of summary judgment, the court of appeals assumed arguments that Abbott needed to establish a nexus between her impairment and a major life activity in which she would otherwise engage.⁴⁸⁹ The court of appeals concluded that the record sufficiently established that Abbott’s HIV infection materially affected her decision not to engage in reproductive activity.⁴⁹⁰

Finally, the court rejected the argument that Abbott faced a relatively small chance of infecting any child she bore because of anti-viral therapy.⁴⁹¹ According to the defendant, an HIV-infected mother faced a twenty-five percent risk of transmitting HIV to her child if she were not treated with an anti-viral therapy. However, with anti-viral therapy employing AZT, the risk of transmission can be reduced to as low as eight percent.⁴⁹² The court, however, rejected the argument that the reduction of risk of transmission meant that HIV-infection provided no impediment to reproductive activity. Instead the court concluded that an eight percent risk of passing HIV to an offspring continued to provide a substantial barrier to reproductive activity by HIV-infected mothers.⁴⁹³

The conclusion that Abbott’s HIV positive status constituted a physical impairment that substantially interfered with her major life activity of reproduction resulted in a finding that she was disabled within the meaning of the ADA,⁴⁹⁴ the court of appeals then turned its attention to the question of whether Abbott posed a “direct threat” if she were to be treated in a dentist’s office.⁴⁹⁵ The answer to this question, according to the court, must be based on current medical knowledge or the best available medical evidence.⁴⁹⁶ The court found the district court’s reliance on expert testimony insufficient as the basis for its determination that Abbott’s HIV infection did not pose a direct threat to others

485. *See id.*

486. *See id.*

487. *Id.*

488. *Id.*

489. *See id.* at 941-42.

490. *See id.*

491. *See id.* at 942.

492. *See id.*

493. *See id.*

494. *See id.* at 948.

495. *Id.* at 943.

496. *See id.* at 944 (citing 28 C.F.R. § 36.208(c) (1996)).

if she were to receive dental treatment in Bragdon's office.⁴⁹⁷ Instead, the court found the CDC recommendation for "universal precautions" and the recommendations of the American Dental Association for safe dental procedures provided a sufficient basis for determining that Abbott could be treated in the dentist's office without providing a direct threat to the health or safety of others.⁴⁹⁸ The court indicated a sensitivity to the safety concerns of health care workers like Dr. Bragdon,⁴⁹⁹ suggesting a need for courts to continue to carefully examine the evidence with regard to the danger posed by a contagious or infectious disease such as HIV. The court concluded "[w]e also recognize that cases of this kind are necessarily fact-sensitive; had the patient required more invasive treatment or had the dentist proffered stronger evidence of direct threat, the result may well have differed."⁵⁰⁰ The court came to the principled position that discrimination cannot be justified on the mere existence of HIV infection; instead, disparate treatment of those infected with HIV must be based on scientific and medical evidence that establishes that the HIV-infected person poses a direct threat to the health or safety of others under Title III of the ADA (and presumably may not be discriminated against in employment if otherwise qualified under Title I of the ADA).⁵⁰¹

In *Bragdon v. Abbott*, the United States Supreme Court in a 5-4 decision affirmed the court of appeals finding that a person with asymptomatic HIV infection is a disabled person within the purview of the ADA, but by an effectively unanimous agreement the Court vacated and remanded the judgment of the issue of whether Abbott's HIV-infection posed a direct threat to the health and safety of others in the context of routine treatment in a dentist's office.⁵⁰²

Writing for the majority, Justice Kennedy applied a three-step process to determine whether Abbott's infection constituted a disability under the ADA: (1) whether asymptomatic HIV infection constitutes a physical impairment; (2) whether reproduction and child bearing constitute major life activities; and (3) whether asymptomatic HIV infection substantially limits the activities of reproduction and child bearing.⁵⁰³

Eschewing a plain language analysis, in an effort to determine the facial meaning of the ADA, the Court's approach to statutory construction placed heavy reliance on the interpretation's given by the DOJ, and by the prior interpretation of previously enacted statutes to which Congress referred in enacting the ADA, most significantly the Rehabilitation Act of 1973.⁵⁰⁴ The

497. *See id.* at 945.

498. *Id.* at 945-46 (citing CDC, *supra* note 459; AMERICAN DENTAL ASSOCIATION, POLICY ON AIDS, HIV INFECTION AND THE PRACTICE OF DENTISTRY (1991)).

499. *See id.* at 949.

500. *Id.*

501. *See id.*

502. *See Bragdon v. Abbott*, 524 U.S. 624 (1998).

503. *See id.* at 631 (applying 42 U.S.C. § 12,102(2)(A) (1994)).

504. *See id.* (citing the Rehabilitation Act of 1973, 29 U.S.C. § 706(8)(B) (1994) and the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3602(h)(1) (1989)).

majority noted the fact that the actual language of the ADA was drawn from the Rehabilitation Act. According to the Court, this gave rise to an implication that the terms were to be construed in accordance with the pre-existing interpretations.⁵⁰⁵ Moreover, the majority noted the explicit direction of Congress to courts that, except as otherwise provided in the Americans with Disabilities Act, the statute is not to "be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title."⁵⁰⁶

The majority determined that the first regulations addressing the question of what constitutes a "physical impairment" were issued in 1977 by the Department of Health, Education and Welfare (HEW).⁵⁰⁷ HEW was the designated agency responsible for coordinating the implementation and enforcement of section 504 of the Rehabilitation Act.⁵⁰⁸ The HEW regulations defined "physical or mental impairment" to include "any physiological disorder . . . affecting one or more of the following body systems [including] . . . hemic [blood] and lymphatic . . ."⁵⁰⁹ The majority noted that HEW did not provide a list of specific disorders constituting a physical or mental impairment because of concern that any specific enumeration of disease conditions might not be comprehensive.⁵¹⁰ The Court also noted that HIV could not be included in a list of specific disorders constituting physical impairments under section 504 since the causal agent of AIDS was not discovered until 1983.⁵¹¹ In 1980, responsibility for implementation and enforcement of section 504 was transferred to the DOJ.⁵¹² The agency "adopted verbatim the HEW definition of physical impairment" in its regulations that remain in force today.⁵¹³

Unlike the district court or the First Circuit Court of Appeals in their earlier consideration of the case, the majority undertook an extensive analysis of the medical and scientific understanding of HIV infection as part of its analysis to determine whether HIV infection constitutes a physical impairment under the ADA. The majority adopted the view that HIV infection is not a series of discrete conditions, but it is a disease following a set course of development.⁵¹⁴ The Court noted that at the initial or primary stage of HIV infection, the so-called "acute" stage, the virus concentrates in the blood and immediately attacks the

505. *See id.* (citing *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 434-38 (1986); *Commissioner v. Estate of Noel*, 380 U.S. 678, 681-82 (1965); *ICC v. Parker*, 326 U.S. 60, 65 (1945)).

506. *Id.* at 631-32 (quoting 42 U.S.C. § 12,201(a)).

507. *Id.* at 632.

508. *See id.* (citing Exec. Order No. 11914, 3 C.F.R. § 117 (1980)).

509. *Id.* (quoting 45 C.F.R. § 84.3(j)(2)(i) (1997)).

510. *See id.* at 633 (citing 42 Fed. Reg. 22,685, reprinted in 45 C.F.R. § at 84, App. A., p. 334).

511. *See id.*

512. *See id.* (citing Exec. Order No. 12250, 3 C.F.R. § 298 (1981)).

513. *Id.* (citing 28 C.F.R. § 41.31(b)(1) (1997)).

514. *See id.* ("The diseases follows a predictable and, as of today, an unattenable course.").

person's immune system.⁵¹⁵ Primary HIV infection produces a significant decline in white blood cells or CD4+ cells.⁵¹⁶ The Court emphasized that HIV infection does not involve a latency or incubation period. With infection, the individual often experiences "[m]ononucleosis-like symptoms, often . . . accompanied by fever, headache, enlargement of the lymph nodes (lymphadenopathy), muscle pain (myalgia), rash, lethargy, gastrointestinal disorders, and neurological disorders."⁵¹⁷ These symptoms abate in two to three weeks.⁵¹⁸ HIV antibodies can be detected in the blood stream within three weeks, and the virus can be detected in the blood stream within ten weeks.⁵¹⁹

When the initial symptoms subside, the person is diagnosed as being in the "asymptomatic" phase. The majority made clear, however, its opinion that there are significant effects of HIV infection that are manifest in the infected individual.⁵²⁰ The Court was emphatic in its understanding of the persistent physiological effects of HIV infection. According to the Court "[a]fter the symptoms associated with the initial state subside, the disease enters what is referred to sometimes as its asymptomatic phase. The term is a misnomer, in some respects, for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections."⁵²¹ The Court notes that a person passing through the so-called asymptomatic phase may appear to have reduced observable physical manifestations of infection as a result of increased viral migration throughout the circulatory system and an increased viral concentration in the lymph nodes with corresponding decrease CD4+ count.⁵²²

The Court notes that a person is diagnosed with AIDS when the CD4+ count drops below 200 cells/mm³ of blood or when CD4+ cells comprises less than fourteen percent of the body's total lymphocytes.⁵²³ It is at this stage that the HIV-infected person is likely to contract various opportunistic infections and diseases such as pneumocystis carinii pneumonic, Karposi's sarcoma, and non-Hodgkin's lymphoma.⁵²⁴

515. *Id.*

516. *See id.* at 634-35.

517. *Id.* at 635 (citations omitted).

518. *See id.*

519. *See id.*

520. *See id.*

521. *Id.*

522. *See id.* at 636.

523. *See id.* (citing HHS/CDC, 1993 Revised Classification System for HIV Infection and Expanded Surveillance Case Definition for AIDS Among Adolescents and Adults, 41 MMWR, Rep. No. RR-17 (Dec. 18, 1972); OSMOND, AIDS KNOWLEDGE BASE 1.1-2 (P. Cohen et al. eds., 2d ed. 1994); Saag, *supra* note 11, at 207; Ward et al., *Current Trends in the Epidemiology of HIV/AIDS in THE MEDICAL MANAGEMENT of AIDS 3* (Merle A. Sande & Paul A. Volberding eds., 5th ed. 1997)).

524. *See id.* (citing P. Cohen & P. Volberding, *Clinical Spectrum of HIV Disease*, in AIDS KNOWLEDGE BASE 4.1-7 (1994); Saag, *supra* note 11, at 207-09).

On the basis of the statutory criteria for an ADA impairment, the majority concluded asymptomatic HIV infection qualifies as a statutory impairment. According to the majority, “[i]n light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold it is an impairment from the moment of its infection.”⁵²⁵ The majority reasoned that HIV infection is a disability under the ADA because HIV infection results in “immediate abnormalities” in the composition of an individual’s blood and significantly depreciates a person’s white cell count and dramatically affects the persons lymph nodes.⁵²⁶ Further, the majority determined that HIV infection must be considered a physiological disorder because of its “constant and detrimental effect on the infected person’s hemic [blood] and lymphatic systems.”⁵²⁷ The majority’s holding results in a finding that HIV infection, whether asymptomatic or symptomatic, is a per se impairment within the terms of the ADA.

Of course, a finding of a per se impairment does not necessarily lead to the conclusion that a person with asymptomatic HIV infection is disabled. A showing must be made that the impairment substantially limits a major life activity of the infected individual.⁵²⁸ It is important to note that although the Court undertakes an analysis of whether reproduction and child bearing constitute major life activities, the majority makes clear that there are likely a wide range of other significant major life activities whose exercise is compromised by HIV infection. The Court nevertheless limited its discussion to those activities that were in the record of the case before the Court. The Court stated unequivocally:

Given the pervasive, and invariably fatal, course of the disease, its effect on major life activities of many sorts might have been relevant to our inquiry. Respondent and a number of amici make arguments about HIV’s profound impact on almost ever phase of the infected person’s life. In light of these submissions, it may seem legalistic to circumscribe our discussion to the activity of reproduction. We have little doubt that had different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities.⁵²⁹

This observation becomes important if subsequent litigation results in judicial authority requiring an individualized determination of whether the impairment of HIV infection results in a substantial limitation on the litigant’s ability to engage in the activity of procreation. Gay men, menopausal women, men who have had a vasectomy, women who have had a hysterectomy, persons who are otherwise sterile, or children may be all faced with the need to identify other

525. *Id.* at 637.

526. *Id.*

527. *Id.*

528. *See id.*

529. *Id.* (citing brief of respondents and amici).

major life activity in order to establish that they are disabled within the terms of the ADA.

In determining whether reproduction constitutes a major life activity, the majority cited the Court of Appeals' discussion of the term "major"⁵³⁰ and concluded that human reproduction, and the closely related activities of child rearing, constitute major life activities in those who undertake them because "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself."⁵³¹ The majority found nothing in the statute to support the petitioner's argument that Congress intended the ADA only to cover aspects of a person's life which have "a public, economic, or daily character."⁵³² Instead, the Court found that the regulations promulgated to implement the ADA and its predecessor suggest the contrary.⁵³³

Similarly, the Court found no merit to the claim that HIV infection does not substantially impede a woman from engaging in reproductive activity. The Court cited a number of aspects of HIV infection that significantly interfered with an HIV-infected individual's ability to engage in reproductive activity including: (1) a significant risk of infecting a sexual partner (sexual transmission of HIV);⁵³⁴ (2) a significant risk of infecting a child during gestation or childbirth (perinatal transmission);⁵³⁵ (3) added costs of long term health care for the child that must be examined and perhaps treated for HIV infection;⁵³⁶ and (4) possible violation of state statutes forbidding persons with HIV infection from having sex with others, regardless of consent.⁵³⁷

The Court rejected the assertion that an HIV-infected woman could reduce the likelihood of giving birth to an infected infant from twenty-five percent to eight percent by the use of anti-retroviral therapy, therefore reducing any limitation on their reproductive activity resulting from their HIV infection. The

530. *Id.* at 638 (citing *Abbott v. Bragdon*, 107 F.3d 934, 939, 940 (1997)).

531. *Id.*

532. *Id.*

533. *See id.* at 638-39.

534. *See id.* at 639-40 (citing Osmond & Padian, *Sexual Transmission of HIV*, in AIDS KNOWLEDGE BASE 1.9-8, 2nd tbl. 2 (P. Cohen et al. eds., 2d ed. 1994) (20% of male partners of women with HIV becomes HIV-positive themselves); Haverkos & Battjes, *Female-to-Male Transmission of HIV*, 268 JAMA 1855-56, tbl. (1992) (25% risk of female to male transmission)).

535. *See id.* at 640 (citing STRAPANS & FEINBERG, *MEDICAL MANAGEMENT OF AIDS* 32 (studio reps 13% to 45% risk of infection, with average of approximately 25%); Connor et al., *supra* note 364, at 1173-76 (placing risk at 25.5%); *Report of a Consumer Workshop, Maternal Factors Involved in Mother-to-Child Transmission of HIV-1*, 5 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME, 1019-20 (1992) (collecting 13 studies placing risk between 14% and 40% with most studies falling within the 25% to 30%)).

536. *See id.* at 641.

537. *See id.* (citing IOWA CODE § 139.1 (1997); MD. CODE ANN., HEALTH-GEN. I § 18-601.1(2) (1994); MONT. CODE ANN. §§ 50-18-112 (1997); N.D. CENT. CODE § 12.1-20-17 (1997); UTAH CODE ANN. § 26-6-3.5(3) (Supp. 1997); § 26-6-5 (1995); WASH. REV. CODE § 9A.36.011(1)(b) (Supp. 1998)).

Court found that even an eight percent possibility of transmitting HIV to an offspring is to be regarded as significant.⁵³⁸ It is clear that the statistical other concerns identified by the Court were a significant basis for its decision; however, from the respondent's revelation that her HIV infection controlled her decision not to have a child was "unchallenged."⁵³⁹

Just as the Court found support for its view of the meaning of "impairment" in the legislative history, implementing regulations of the ADA, and Rehabilitation Act of 1973, the Court found similar support for its view that the disability provision of the ADA was meant to include individuals with asymptomatic HIV infection.⁵⁴⁰ The Court first looked to interpretations of the Rehabilitation Act of 1973 that extended coverage to those with HIV infection. The Court began by citing the 1988 Memorandum opinion issued by the Office of Legal Counsel of the DOJ concluding that the Rehabilitation Act "protects symptomatic and asymptomatic HIV-infected individuals against discrimination in any covered program."⁵⁴¹ The Court also noted that every agency that addressed the problem before enactment of the ADA reached the conclusion that those with HIV infection were handicapped⁵⁴² and that existing agencies addressing the issue since enactment of the ADA have adhered to the conclusion that HIV infection constitutes a handicap or disability.⁵⁴³ Further the Court observed that every court that had addressed the issue of coverage under the Rehabilitation Act before the ADA was enacted in 1990 concluded that asymptomatic HIV infection satisfied the Rehabilitation Act's definition of handicap.⁵⁴⁴

538. See *id.*

539. *Id.* (citations omitted).

540. *Id.* at 642.

541. *Id.* (quoting *Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals*, 12 OP. OFF. LEGAL COUNSEL 264, 264-65 (Sept. 27, 1998)).

542. See *id.* at 643 (citing FEDERAL CONTRACT COMPLIANCE MANUAL APP. 6D, 8 FEP MANUAL 405.352 (Dec. 23, 1998); *In re David Ritter*, No. 03890089, 1989 WL 609697, *10 (EEOC Dec. 8, 1989)).

543. See *id.* (citations omitted).

544. See *id.* at 644 (citing *Doe v. Garrett*, 903 F.2d 1455, 1457 (11th Cir. 1990); *Baxter v. Belleville*, 720 F. Supp. 671, 679 (E.D. Pa. 1990) (Pennsylvania Human Relations Act)); *Ray v. Sch. Dist. of DeSoto County*, 666 F. Supp. 1524, 1536 (M.D. Fla. 1987); *Thomas v. Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1987); *District 27 Community Sch. Bd. v. Board of Ed. of New York*, 502 N.Y.S.2d 325, 335-37 (Sup. Ct. Queens Cty. 1986); see also cases finding HIV to be a handicap without distinguishing between symptomatic and asymptomatic: *Robertson v. Granite City Community Unit School District No. 9*, 684 F. Supp. 1002, 1006-07 (S.D. Ill. 1998); *Association of Relations and Friends of AIDS Patients v. Regulations and Permits Administration*, 740 F. Supp. 95, 103 (P.R. 1990) (Fair Housing Amendments Act); *Martinez ex rel. Martinez v. School Board of Hillsborough City*, 861 F.2d 1502-06 (11th Cir. 1988); *Chalk v. United States District Court*, 840 F.2d 701, 701-06 (9th Cir. 1988) *Doe v. Dalton Elementary School District No. 148*, 694 F. Supp. 440, 445-45 (N.D. Ill. 1988); *Local 1813, AFOE v. United States Department of State*, 662 F. Supp. 50, 54 (D.C. 1987).

The Court adopts a traditional maxim of statutory interpretation ignored by the Fourth Circuit in *Runnebaum II*, and not adequately stated by the First Circuit in its opinion in *Abbott v. Bragdon*, that needs to be emphasized in face of demands for plain language analysis which remains sensitive to legislative history. The Court clearly states “[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”⁵⁴⁵ The majority maintains that if Congress had done nothing more than integrate the existing language of the Rehabilitation Act into the ADA, given the interpretation that language had been given, it would be evidence that Congress intended the ADA’s disability provision to include asymptomatic HIV infection.⁵⁴⁶ The majority points out that Congress was well aware of the 1988 DOJ Memorandum opinion and, moreover, specifically endorsed the analysis and conclusions of the DOJ Memorandum in the House and Senate reports accompanying the ADA.⁵⁴⁷ The Court also found significant that Congress had incorporated the same definition into its earlier enactment of the Fair Housing Act Amendments of 1988.⁵⁴⁸ Moreover, it is noteworthy that the regulations promulgated in 1989 by the Department of Housing and Urban Development construed the Fair Housing Act as providing protection for persons with HIV infection.⁵⁴⁹

The Court also found persuasive the regulations promulgated by the DOJ, as the agency directed by Congress to issue implementing regulations for Title III,⁵⁵⁰ including “HIV infection (symptomatic and asymptomatic)” in the list of disorders constituting a physical impairment.⁵⁵¹ Moreover, the Court noted that the DOJ in its *Title III Technical Assistance Manual*, concludes that persons with asymptomatic HIV infection fall within the ADA’s definition of disability.⁵⁵² The Court found similar authority in the regulations and guidance from other agencies involved in administration and enforcement of the ADA, including the EEOC and the Department of Transportation.⁵⁵³

545. *Abbott*, 524 U.S. at 645 (citing *Lorillard v. Pons*, 434 U.S. 575, 580-87 (1978)).

546. *See id.* at 644-45.

547. *See id.* at 645 (citing H.R. REP. 101-485, pt. 2, p. 52 (1990); H.R. REP. NO. 101-485, p. 2 at 28 n.18; S. REP. NO. 101-116, pp. 21-22 (1989) (all endorsing the conclusion of the DOJ Memorandum that HIV infection, whether symptomatic or asymptomatic, qualified as a handicap under the Rehabilitation Act of 1973)).

548. *See id.* (citing 42 U.S.C. § 3602(h)(1) (1994)).

549. *See id.* (citing 54 Fed. Reg. 3232, 3245 (1989) (codified at 24 C.F.R. § 100.201 (1997))).

550. *See id.* at 646 (citing 42 U.S.C. § 12,186(B) & (O) (1994 & Supp. III 1997)).

551. *Id.* (citing 28 C.F.R. § 36.104(1)(ii)).

552. *See id.* (citing U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIVISION, THE AMERICANS WITH DISABILITIES ACT; TITLE III TECHNICAL ASSISTANCE MANUAL 9 (Nov. 1992)).

553. *See id.* at 647 (citing 42 U.S.C. § 12,116 (1994) (authorizing EEOC to issue regulations under Title I); 42 U.S.C. § 12,134(2) (authorizing DOJ to issue regulations implementing public service provision of Title II, subtitle A); 42 U.S.C. §§ 12,149, 12,164, 12,186, 12,206(C) (1994 & Supp. III 1997) (authorizing Sec. of Trans. To issue regulations relevant provisions of Title II

Although *Abbott* was found to have a disability under the ADA, the Court recognized that she could be refused treatment in a dentist's office if her HIV infection "pose[d] a direct threat to the health and safety of others" that could not be "eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services [in the dentist's office]."⁵⁵⁴ The Court assessed the possible risks from the point of view of providers of service, stressing that "the risk assessment must be based on medical or other objective evidence."⁵⁵⁵ The Court recognized that a provider of services "belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability."⁵⁵⁶

While the Court recognized that the views of public health authorities, such as the United States Public Health Services, CDC, and the National Institute of Health deserve special weight and authority, the Court maintained that the views of these agencies are not conclusive.⁵⁵⁷ The majority concluded that the court of appeals was right to have rejected the trial court's total reliance on the affidavit of a CDC official,⁵⁵⁸ but the majority also faulted the court of appeals for its reliance on the 1993 CDC Dentistry Guidelines and the 1991 American Dental Association Policy on HIV.⁵⁵⁹ The Court first faulted the Fourth Circuit for not recognizing the limited importance of the CDC guidelines, for in the Court's view "the Guidelines do not necessarily contain implicit assumptions conclusive of the point to be decided. The Guidelines set out CDC's recommendations that the universal precautions are the best way to combat the risk of HIV transmission. They do not assess the level of risk."⁵⁶⁰ Similarly, the majority faulted the Fourth Circuit on its reliance on the Dental Association policy statement. The majority concluded it is not clear whether the Dental Association policy was based on an assessment of the dentist's ethical and professional duties rather than a scientific assessment of the risk faced by the dentist, which is the basis of the ADA's statutory concerns.⁵⁶¹ According to the Court "[e]fforts to clarify dentists' ethical obligations and to encourage dentists to treat patients with HIV infection with compassion may be commendable, but the question under the statute is one of statistical likelihood, not professional responsibility."⁵⁶² Neither did the Court find the deposition the petitioner placed

and III)). These agencies concluded HIV infection is an ADA physical impairment under the ADA. See 28 C.F.R. § 35.104 (1)(iii) (1997); 49 C.F.R. § 37.3, 38.3 (1977); 56 Fed. Reg. 13,858 (1991).

554. *Abbott*, 524 U.S. at 648-49 (applying 42 U.S.C. § 12,182(B)(3) (1994)). Cf. 42 U.S.C. §§ 12,111(3), 12,113(B)).

555. *Id.* at 649 (citing *School Bd. Of Nassau City v. Arline*, 480 U.S. 273, 288 (1987); 28 C.F.R. § 36.208(e) (1997)).

556. *Id.*

557. See *id.* at 650 (citing *Arline*, 480 U.S. at 288; 28 C.F.R. p. 36, App. B, p.626 (1977)).

558. See *id.* (citing *Abbott v. Bragdon*, 107 F.3d 934, 945 n.7 (1997)).

559. See *id.* at 651 (citing *Abbott*, 107 F.3d at 945-46).

560. *Id.* at 651-52.

561. See *id.* at 652.

562. *Id.*

into the trial court record determinative evidence on the extent of the danger of airborne transmission of HIV in the setting of dental treatment using high-speed drills, nor were the reports of dental workers who had possible occupational transmission of HIV sufficient to establish the kind of risk showing required by the statute.⁵⁶³ The Court found itself constrained on the question of risk by what it felt was an inadequate record. The Court pointed out that "we have not had briefs and arguments directed to the entire record."⁵⁶⁴ The Court remanded the question of risk to the Court of Appeals to determine whether the petitioner had presented sufficient evidence to raise a triable issue of fact on the question of risk.⁵⁶⁵

Justice Stevens, joined by Justice Breyer, concurred with the majority stating that there was no doubt that the asymptomatic HIV infection of Abbott placed her within the category of ADA disability.⁵⁶⁶ However, Justice Stevens expressed a preference for outright affirmance, without remand on the dire of threat because the respondent had failed to raise a triable issue of fact on the direct threat issue, and because the court of appeals' decision was based on the record.⁵⁶⁷

Justice Ginsberg filed a concurring opinion agreeing that the case should be remanded on the direct threat issue because it is wise to "[err] if at all, on the side of caution."⁵⁶⁸ However, Justice Ginsberg indicated that she would have found Abbott disabled both under the actual disability prong of the ADA definition, and the "regarded as" standard.⁵⁶⁹ Justice Ginsberg's opinion also suggested other major life activities might be cited by HIV infected individuals.⁵⁷⁰ Justice Ginsberg observed "[t]he disease inevitably pervades life's choices: education, employment, family and financial undertakings. It affects the needs for and, as this case shows, the ability to obtain health care because of the reaction of others to the impairment."⁵⁷¹

Justice O'Connor, concurring in the judgment and dissenting, in part, maintained that Abbott did not establish that her HIV infection substantially limited a major life activity.⁵⁷² Justice O'Connor found reproductive activity to be different in kind from the representative life activities set out in the applicable regulation that includes "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁵⁷³ Moreover, Justice O'Connor concluded that the First Circuit failed to adequately determine

563. See *id.* at 652-53.

564. *Id.* at 654.

565. See *id.* at 655.

566. See *id.* (Stevens, J., concurring).

567. See *id.*

568. *Id.* at 656 (Ginsberg, J., concurring).

569. *Id.*

570. See *id.*

571. *Id.*

572. See *id.* at 664 (O'Connor, J., concurring in part and dissenting in part).

573. *Id.* at 665.

whether Abbott's HIV infection posed a direct threat.⁵⁷⁴

Chief Justice Rehnquist filed a two part dissent, joined in the first part by Justices Scalia and Thomas, and joined in the second part by Justice O'Connor.⁵⁷⁵ In the first part of his dissent the Chief Justice stressed the need for an "individualized" inquiry to determine whether an individual has a disability under the ADA since the disability determination must be made "with respect to an individual" and because the "major life activities" must be those "of such individual."⁵⁷⁶

The Chief Justice accepted for the sake of analysis that Abbott's asymptomatic HIV infection constituted an ADA impairment since it was not disputed by Bragdon.⁵⁷⁷ However, on the issue of whether reproduction constituted a major life activity, the Chief Justice maintained the fact that being "important in a person's life" is not dispositive.⁵⁷⁸ Rather, the Chief Justice maintained that the major life activities recognized in the relevant agency regulations required a certain regularity engagement.⁵⁷⁹ According to the Chief Justice "[t]he common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual. They are thus quite different from the series of activities leading to the birth of a child."⁵⁸⁰

The Chief Justice extended his argument that, even assuming reproduction was a major life activity, asymptomatic HIV infection would not substantially limit engagement in reproduction.⁵⁸¹ According to the Chief Justice "[t]he record before us leaves no doubt that those so infected are still entirely able to engage in sexual intercourse, give birth to a child if they become pregnant, and perform the manual tasks necessary to rear a child to maturity."⁵⁸² From the Chief Justice's point of view, asymptomatic HIV infection may give an infected person reasons for not engaging in reproduction, but HIV infection does not "physically" substantially lessen the ability of a person to engage in reproduction.⁵⁸³ According to the Chief Justice, "[w]hile individuals infected with HIV may choose not to engage in these activities, there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a 'limit' on one's own life activities."⁵⁸⁴ Nor did the Chief Justice find the invocation of the statutory terms "substantially lessen" significant, since in his view there is no evidence that because of HIV infection Abbott has any less ability than others to

574. *See id.*

575. *See id.* at 657 (Rehnquist, C.J., dissenting).

576. *Id.* (applying 42 U.S.C. §§ 12,102(2) and 12,102(3)(A) (1994)).

577. *See id.* at 658.

578. *Id.* at 660.

579. *See id.*

580. *Id.*

581. *See id.* at 660-61.

582. *Id.*

583. *Id.*

584. *Id.* at 661.

engage in reproductive activity “as a matter of mere physical ability.”⁵⁸⁵ The Chief Justice also did not look kindly on the assertion that Abbott’s HIV infection would not permit her to complete the process of child rearing because of his reading of the word “limits” (which is limited to the present tense) and his view that child rearing necessarily looked to the future.⁵⁸⁶

The Chief Justice also found it significant that there was no evidence in the record that, prior to becoming infected with HIV, Abbott’s major life activities included reproduction. According to the Chief Justice “[t]here is absolutely no evidence, that absent the HIV, respondent would have had or was even considering having children.”⁵⁸⁷ The Chief Justice concluded that given this evidence, Abbott does not meet the ADA’s definition of “disability” because it requires that the major life activity at issue be “of such individual.”⁵⁸⁸ It should be recalled that even the *Runnebaum II* majority suggested it was not necessary to determine that the particular individual would otherwise engage in the major life activity which the ADA impairment substantially limited.⁵⁸⁹ Also, it is important to note that the majority in *Bragdon* specifically concluded “[t]estimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged.”⁵⁹⁰ The spectre thus remains that it may be necessary for an asymptomatic HIV infected individual claiming disability protection under the ADA to establish that there is a particular recognized major life activity in which they would otherwise engage, but for his or her HIV infection.

Part II of the dissent established agreement with the majority’s decision to remand the case on the issue of “direct threat” but expressed disagreement with the majority’s grant of special weight and authority to the views of public health authorities such as the United States Public Health Service, CDC, and the National Institute of Health.⁵⁹¹ According to the Chief Justice “[i]n litigation between private parties originating in the federal courts, I am aware of no provision of law or judicial practice that would require or permit courts to give some scientific views more credence than others simply because they have been endorsed by a politically appointed public health authority (such as the Surgeon General).”⁵⁹² In the Chief Justice’s view, expert opinions, including that of officials of the public health authority, “must stand on their own.”⁵⁹³ The Chief

585. *Id.*

586. *Id.* (citing 42 U.S.C. § 12,102(2)(h) (1994) (“limits” (present tense) a major life activity)).

587. *Id.* at 659.

588. *Id.*

589. See *Runnebaum v. NationsBank of Md.*, 123 F.3d 156, 170 (4th Cir. 1997) (en banc).

590. *Abbott*, 524 U.S. at 641 (citing *Abbott v. Bragdon*, 912 F. Supp. 580, 587 (D. Me. 1995); *Abbott v. Bragdon*, 107 F.3d 934, 942 (1997) (“Testimony from the respondent that her HIV infection controlled her decision not to have a child is unchallenged.”)).

591. *Id.* at 661-63 (Rehnquist, C.J., dissenting).

592. *Id.* at 663.

593. *Id.*

Justice concluded that the petitioner presented more than enough evidence to avoid summary judgment on the direct threat question.

On remand in an opinion issued on December 20, 1998, the First Circuit Court of Appeals reaffirmed its conclusion that Bragdon violated the ADA by refusing to treat an HIV-positive dental patient in his office.⁵⁹⁴ The three-judge panel concluded that Bragdon produced no legitimate medical or scientific evidence to show that providing routine, in-office dental care to an HIV-infected patient would subject him or others to any significant direct threat of contracting HIV infection.⁵⁹⁵ The court maintained that Bragdon's claims regarding the risks of HIV transmission from patient to dentist, where there was compliance with CDC "universal precautions," were "too speculative" and "too tangential" to create a genuine issue of material fact.⁵⁹⁶ The court of appeals panel viewed the 1993 CDC guidelines as "competent evidence" by a recognized public health authority that the provision of routine dental care of the type at issue in the litigation before the court could be provided without threat of infection to the dentist or assisting health care worker.⁵⁹⁷ Moreover, the court noted that the brief submitted by the dental association confirmed that the organization's 1991 policy statement on the treatments of HIV-positive patients originated with the association's committee for scientific affairs, not its committee on ethics.⁵⁹⁸ Nevertheless, the court issued a caveat recognizing that future medical or scientific evidence might provide a basis for a different conclusion on the issue of direct threat.⁵⁹⁹ According to the court "[t]he state of scientific knowledge concerning this disease is evolving, and we caution future courts to consider carefully whether future litigants have been able, through scientific advances, more complete research, or special circumstances, to present facts and arguments warranting a different decision."⁶⁰⁰ The consequence of this ruling is a final affirmation of the grant of summary judgment by the district court in 1995 enjoining Bragdon from refusing to provide in-office care to patients based solely on their HIV infection.

CONCLUSION: SOME REMAINING ISSUES

The issue of "direct threat" under Title III⁶⁰¹ and the issue of "otherwise qualified under Title I"⁶⁰² are fact specific and provide the basis for continuing litigation under the ADA, even with the effective ruling of the United States Supreme Court that HIV-infection is an ADA per se impairment.

594. See *Abbott v. Bragdon*, 163 F.3d 87 (1st Cir. 1998), *cert. denied*, 526 U.S. 1131 (1999).

595. See *id.* at 90.

596. *Id.*

597. *Id.*

598. See *id.*

599. See *id.*

600. *Id.*

601. 42 U.S.C. § 12,182(b)(3) (1994).

602. *Id.* § 12,112(8).

The Court shed little light on what actually constitutes a direct threat to the health or safety of others. While the Court indicated that significant weight should be given to the policies and statements of the public health authorities such as the United States Public Health Services, the CDC and the National Institute of Health,⁶⁰³ the Court provided no guidance for determining what constitutes a significant risk to others.

The question of what constitutes a "major life activity" will also likely continue to be litigated. Because of reference to "intimate sexual relations" in the 1988 DOJ Memorandum,⁶⁰⁴ it is possible that a court considering the matter would reach the conclusion that "intimate sexual relations" constitutes a major life activity under the ADA. The similarity to the importance of "reproductive activity" and the fact that it seems to be in the same class of, if not often a related activity. One can anticipate similar arguments relating to "substantially limits" in terms of concern with the possibility of infecting a sexual partner and the possibility of violation of statute laws prohibiting certain sexual relations by HIV-infected persons.

An issue may also arise as to whether an HIV-infected individual remains disabled if drug therapies become available that may halt the reproduction of the virus, restore CD4+ count, or even neutralize HIV. This matter gains significance when one recalls that the majority began its discussion of HIV-infection with the sentence "[t]he disease follows a predictable and, as of today, an unalterable course."⁶⁰⁵ The EEOC view is that the determination of disability should be made without regard to the ameliorative effects of medication.⁶⁰⁶ Some courts, however, have found that when medication improves an individual's physical condition there is no disability.⁶⁰⁷ The Court in *Bragdon* limited its consideration to the impact of medication in reducing perinatal transmission of HIV.

Another area that needs to be resolved is that of HIV infected health care workers and whether they are otherwise qualified. The existing case law permits restriction, reassignment or termination of HIV-infected health care workers who are engaged in what has been characterized as exposure-prone procedures.⁶⁰⁸ This body of judicial opinion has held that such treatment of HIV-infected health care workers does not constitute discrimination under Title I of the ADA⁶⁰⁹ or

603. See *Bragdon v. Abbott*, 524 U.S. 624, 650 (1998).

604. DOJ Memorandum II, *supra* note 87.

605. *Abbott*, 524 U.S. at 633.

606. See EEOC COMPLIANCE MANUAL (CCH) § 902.5 (Mar. 14, 1995).

607. See *Gaddy v. Four B Corp.*, 953 F. Supp. 331, 337 (D. Kan. 1997).

608. See *Abbott*, 524 U.S. at 653-54.

609. See *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, (4th Cir. 1995) (upholding the dismissal of a neurosurgery resident who tested HIV-positive); *Mauro v. Bogess Med. Ctr.*, 886 F. Supp. 1349 (W.D. Mich. 1995) (upholding dismissal of a surgical student after report of his HIV-infection), *aff'd*, 137 F.3d 398 (6th Cir. 1998); *Doe v. Washington Univ.*, 780 F. Supp. 628 (E.D. Mo. 1991) (disenrollment of HIV-positive dental student).

under section 504 of the Rehabilitation Act of 1973⁶¹⁰ because such HIV-infected health care workers are not "otherwise qualified." Such adverse employment decisions have been legally sanctioned even though there is authority in the medical literature for the view that the risk of transmission from an infected patient to a health care worker is much greater than the risk of transmission from an infected health care worker to a patient. The case law, however, has distinguished the physician-patient relationship as placing a special duty on the physician "to do no harm" to the patient, with this special duty being cited in the opinions finding the HIV-infected physician "not otherwise qualified."⁶¹¹ Such a distinction has no basis in the statutory language of the ADA. While this issue was raised by *Bragdon* in his arguments related to "direct threat," the Supreme Court chose not to address the issue. It is likely that future litigation will involve the matter of reconciling the direct threat analysis developed under Title III with the "otherwise qualified" analysis under Title I of the ADA and section 504 of the Rehabilitation Act.

The Supreme Court's opinion, standing alone, does not provide assurance of ADA protection for HIV infected persons who cannot show that they would otherwise engage in reproductive activity, but for their HIV infection. The elderly, post-menopausal women, homosexuals, males with vasectomies, females with hysterectomies, other persons who are sterile, children, and those who have chosen to be celibate might all fail to qualify under such a disability standard unless other major life activities are recognized in which these individuals would engage but for their HIV infection. Of course, the majority opinion hints that it is likely that in a properly argued case, the Supreme Court would take a broad view of major life activities impacted by HIV infection. Nevertheless, although the majority in *Bragdon* clearly held that HIV-infection, whether symptomatic or asymptomatic, is always an impairment under the ADA, the Court declined to decide that a person with HIV infection always is a person with a disability.

610. 42 U.S.C. § 12,113(b) (1994).

611. *Id.* § 12,182(b)(3).

